

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF TEXAS
3 HOUSTON DIVISION

4 UNITED STATES OF AMERICA)
5 v.) NO. H-11-CR-722-1,2
6 ABRAHAM MOSES FISCH, ET AL) July 28, 2014

7 HEARING
8 BEFORE THE HONORABLE LEE H. ROSENTHAL
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24
25 Proceedings reported by mechanical stenography and produced
by computer-aided transcription.

1 THE COURT: Go ahead and state your appearances and
2 then you may be seated.

3 MR. JOHNSON: Robert Johnson for the government.

4 MR. PEARSON: John Pearson for the United States.

11:33 5 Good morning, Your Honor.

6 MR. SILVERMAN: Your Honor, Norm Silverman for
7 Mr. Fisch, the late filer.

8 I am sorry about that. I worked on that all
9 weekend, and when I converted it to a PDF I gave it a
11:33 10 similar name and I messed up when I clicked on my PDF to
11 file. So, I'm very sorry.

12 THE COURT: Thank you.

13 MR. SILVERMAN: Yes, ma'am.

14 MS. CRISWELL: Regina Criswell for Monica Bertman.

11:33 15 MR. DOYLE: Paul Doyle.

16 THE COURT: Thank you. You may all be seated.

17 So, what's the most efficient way to present
18 the issues we have to deal with this morning?

19 MR. JOHNSON: Judge, I think we should start with
11:33 20 the conflict issue, resolve that, and then we can --
21 depending on how that's resolved, then we can decide how
22 to --

23 THE COURT: And now we have, apparently, two
24 conflict issues. Obviously, the larger elephant is the
11:33 25 Silverman elephant, but, apparently, we also have an issue

1 with respect to Mr. Hinton.

2 And I do notice that Mr. Portillo's counsel is
3 also present.

4 MS. MUSICK: Yes, Your Honor.

11:34 5 THE COURT: Go ahead and state your appearance.

6 MS. MUSICK: JoAnne Musick for Mr. Portillo.

7 THE COURT: All right. Very good. Thank you. I
8 appreciate your being here.

9 All right. So, let's start with the
11:34 10 government presenting its view of where we are right now,
11 and then I will hear from counsel for Mr. Portillo, and then
12 I will hear from Mr. Silverman.

13 MR. SILVERMAN: Yes, Your Honor.

14 THE COURT: And I don't know if any of this bears
11:34 15 on the co-defendant.

16 MS. CRISWELL: I don't think so, Your Honor.

17 THE COURT: All right. Thank you. In which case,
18 I won't solicit response. If you have one, of course, let
19 me know.

11:34 20 MR. JOHNSON: Your Honor, on the conflict issue,
21 the question is whether Mr. Silverman's representation on
22 the forfeiture matter for Mr. Portillo is -- the initial
23 question is whether that matter is substantially related to
24 this case.

11:35 25 THE COURT: So, is it your position on behalf of

1 the government that this a) is a conflict and, if so, is it
2 actual or potential?

3 MR. JOHNSON: Your Honor, our position is that it
4 is a conflict and it is an actual conflict.

11:35 5 THE COURT: All right.

6 MR. JOHNSON: And the background facts are:

7 There is a seizure from a bus of money. There
8 are two couriers on a bus. They were found to be
9 transporting money. When they were sought by Houston Police
11:35 10 Department officers, they said that they were being paid a
11 thousand dollars by Portillo to transfer the money from
12 Atlanta to Houston.

13 THE COURT: And give me a date so we have the
14 chronology.

11:35 15 MR. JOHNSON: That was September 20, 2000.

16 THE COURT: Okay.

17 MR. JOHNSON: And, thereafter, forfeiture
18 proceedings, civil forfeiture proceedings, began regarding
19 the forfeiture of that money.

11:36 20 THE COURT: And was Mr. Portillo's criminal case
21 then pending?

22 MR. JOHNSON: No. The investigation of Portillo
23 did not start until -- the federal investigation did not
24 start until around, I'd say, 2003, 2004.

11:36 25 THE COURT: So, it was well before the federal

1 investigation into Mr. Portillo.

2 MR. JOHNSON: It was.

3 THE COURT: Had he come to state law enforcement
4 attention by then?

11:36 5 MR. JOHNSON: Yes, in multiple states.

6 This is one of the incidents that kicked off
7 the investigation, ultimately. And I can tell you that at
8 trial in this matter -- I actually brought my trial notebook
9 from the Portillo trial. The first nine exhibits of the
10 trial binder are the bus seizure.

11 And the way that we were going to prove that
12 this is Portillo's money is -- The courier said, 'We'll be
13 getting paid by Portillo,' but we couldn't put that into
14 evidence because it's hearsay. The way to prove it was the
15 claim for seized property that Portillo filed in the civil
16 matter, and that's Exhibit 9 of the Portillo criminal case.

17 And when I gave the opening statement --

18 THE COURT: So, your position -- and I don't mean
19 to interrupt you, but I just want to make sure that I'm
11:37 20 understanding your argument.

21 Your position is that you can't cabin the
22 forfeiture proceeding and issues and the representation of
23 Mr. Portillo in those matters. You can't separate them in a
24 neat cabin from --

11:37 25 MR. JOHNSON: Right. They're intertwined.

1 THE COURT: -- and divorce them, segregate them,
2 from the underlying criminal proceedings that came to
3 involve Mr. Fisch?

4 MR. JOHNSON: Right.

11:37 5 THE COURT: Okay.

6 MR. JOHNSON: And that seizure was the first thing
7 that we talked about in opening in the Portillo trial, and
8 it's the first nine exhibits.

9 And Exhibit 9, if the Court would like to
11:38 10 review it --

11 THE COURT: Yes.

12 MR. JOHNSON: I will just give you the whole
13 notebook. You can see the first nine exhibits.

14 THE COURT: Okay. Got it. Thank you.

11:38 15 MR. JOHNSON: And, so, the defense relies on the
16 *Burns* case, which I have read at least a little part of this
17 morning, and it looks to me like --

18 THE COURT: Would you spell that for the court
19 reporter.

11:39 20 MR. JOHNSON: *Burns*, B-u-r-n-s.

21 THE COURT: All right.

22 MR. JOHNSON: And it's cited in the defense's brief
23 they just filed.

24 From reading the *Burns* case, it looks to me
11:39 25 like the basis of that decision that there was no conflict

1 was that -- and I am quoting from the opinion -- "The facts
2 and issues of the previous representation had no relation to
3 the charges brought against Burns." And, so, the previous
4 representation --

11:39 5 THE COURT: Well, obviously, the relationship of
6 the subject matter of the multiple representations is a
7 critical factor in determining whether an actual conflict is
8 present.

9 MR. JOHNSON: Right. And, so, in *Burns* they found
11:39 10 that they're really not related, and our point is here that
11 they're not just related; it's, really, the same thing. I
12 mean, that seizure was one of the bases for the criminal
13 prosecution of Portillo.

14 THE COURT: When was the forfeiture -- What was the
11:39 15 status of the forfeiture proceeding in which Mr. Silverman
16 represented Mr. Portillo at the time of the criminal case in
17 which Mr. Silverman did not represent Mr. Portillo? What
18 was their relationship back then?

19 MR. JOHNSON: Well, I know that the --

11:40 20 THE COURT: I didn't say that very well. I know
21 that you're telling me that the way you were going to try
22 the criminal case involved the forfeiture case.

23 MR. JOHNSON: Right. And that, clearly, the claim
24 had already been filed back in 2001, I think is the date on
11:40 25 that Exhibit 9. And I know that the forfeiture action was

1 stayed for a period of time because of the criminal
2 investigation.

3 THE COURT: Obviously, it wasn't resolved until the
4 guilty plea in the criminal case.

11:40 5 MR. JOHNSON: Right. And that's what was offered.

6 So, that's Point No. 1. We believe they're
7 closely related and intertwined.

8 And Point No. 2 is that we believe that
9 Mr. Silverman really does have confidential information in
11:41 10 his possession from Mr. Portillo, and he essentially sets
11 that out in his motion. He says that Portillo told him
12 repeatedly this money is not drug proceeds; it's from his
13 club. Well, it turns out those are misrepresentations and
14 those are statements that Portillo made to his attorney.

11:41 15 THE COURT: I was troubled by them, because these
16 are statements of what Mr. Portillo told Mr. Silverman in an
17 attorney-client relationship, when Mr. Portillo has said, in
18 a filed document in this court, 'I'm not waiving my
19 privilege.' Mr. Silverman can't waive the privilege for
11:41 20 him.

21 MR. JOHNSON: Right.

22 THE COURT: So, I was very troubled to see those
23 statements, to see Mr. Silverman repeating what his client
24 had told him when Mr. Silverman's client hasn't waived the
11:42 25 prohibition against Mr. Silverman doing that.

1 MR. SILVERMAN: If I may, Your Honor.

2 THE COURT: You will, but not yet.

3 MR. SILVERMAN: Yes, ma'am.

4 THE COURT: I am alerting you. I'm worried.

11:42 5 MR. SILVERMAN: Very well.

6 MR. JOHNSON: Well, since 2009, when Portillo pled
7 guilty, we know that those statements must have been false.
8 He pled -- part of his plea was to that seizure. That was
9 part of the underlying evidence, and I believe that that was
11:42 10 part of the facts read into the record on the plea colloquy,
11 if I remember correctly.

12 And, so, those are, I think, the two main
13 things that distinguish this case from the *Burns* case upon
14 which the defense relies.

11:42 15 THE COURT: How do you think that the -- What is
16 the government's view of the risk if Mr. Silverman
17 continues -- I mean, I have got a waiver from Mr. Fisch. I
18 obviously have, under the law, the ability to accept or --
19 the discretion --

11:43 20 MR. JOHNSON: Right.

21 THE COURT: -- to accept or decline that waiver.
22 If I were to accept the waiver, what does the government
23 view as the potential for conflict if the trial proceeds
24 and, as expected, Mr. Portillo is the star witness against
11:43 25 Mr. Fisch or a star witness against Mr. Fisch and

1 Mr. Silverman is called upon to cross-examine him?

2 MR. JOHNSON: I don't think there's, frankly, much
3 danger to the Fisch case.

4 THE COURT: Tell me what you mean by that.

11:43 5 MR. JOHNSON: Well, you know, if anything, the
6 confidential information in Mr Silverman's possession gives
7 him an advantage in cross-examining Portillo. It doesn't
8 really prejudice Fisch. It prejudices Portillo.

9 THE COURT: Does Mr. Silverman have the ability to
11:44 10 use that information given Mr. Portillo's refusal to waive
11 the privilege?

12 MR. JOHNSON: And that's a good question. I hadn't
13 thought of it in those terms.

14 It may not, and it may be that Mr. Silverman
11:44 15 now has to stay away from that whole set of issues, and he
16 may not be able to cross Portillo about the fact that
17 Portillo was claiming, originally, that the money was
18 legitimately earned from his nightclub business and then
19 ultimately pled guilty and made it clear that it was not
11:44 20 earned by his nightclub business.

21 THE COURT: So, if Mr. Silverman were to put a
22 filter in place that says 'I can't use anything that
23 Mr. Portillo told me in confidence during the course of our
24 relationship in cross-examining him when he attempts to' --
11:45 25 'when he testifies against my client, Mr. Fisch' -- Assuming

1 that can be done effectively without opening up an
2 ineffective assistance risk to Mr. Fisch -- "assuming" --
3 does that -- if we got an independent lawyer, a separate
4 lawyer, either for the whole case or for cross-
11:45 5 examination -- some courts have dealt with situations like
6 this in that fashion -- a few. Of course, those lawyers
7 wouldn't have access to that kind of information from
8 Mr. Portillo in the first place. So, it doesn't
9 disadvantage Mr. Silverman, in a sense, because it puts him
11:45 10 at the same playing field, although I guess the question
11 then is he doesn't know information that was told to him
12 solely in confidence and information that may have been
13 shared with others as well that he could have used, but he
14 learned of it as the lawyer as opposed to through some other
11:46 15 means; so, he might be disadvantaged and you just don't
16 know.

17 MR. JOHNSON: And I don't know what information was
18 told to him either.

19 THE COURT: That might have been available
11:46 20 elsewhere or might not have been.

21 MR. JOHNSON: Right.

22 THE COURT: So, is there any -- as you have read
23 the cases -- and I assume that we have all read the same
24 cases -- what is the closest case in which the individual
11:46 25 who is the basis for the conflict, the client in the prior

1 representation -- when that client refuses to allow a waiver
2 and the use of any information gained from that client at
3 all or information learned about that client in the course
4 of the representation -- what do the cases -- what's the
11:47 5 best case?

6 MR. JOHNSON: Yeah. Unfortunately, I can't really
7 point the Court to any analogous case. My time to research
8 this is relatively limited, but --

9 THE COURT: I guess my question is this. Is there
11:47 10 any case in which that occurs in which courts have not found
11 conflict?

12 MR. JOHNSON: That I have not seen, but that
13 doesn't necessarily mean it hasn't happened, and I am happy
14 to spend some more time looking if the Court would like me
11:47 15 to.

16 I do agree -- I think the *Burns* case is -- in
17 terms of the situation, it's relatively close. It doesn't
18 involve forfeiture, but I think it distinguishable for
19 reasons we talked about, but that doesn't really involve the
11:48 20 client asserting the issue, the conflict.

21 THE COURT: Do you know, from the government's
22 perspective -- Mr. Portillo, as I understand it, pleads
23 guilty in May of 2009. Final judgment is entered in
24 February, 2010.

11:48 25 Are you aware of -- was the forfeiture case

1 resolved as part of the same global arrangement?

2 MR. JOHNSON: The forfeiture case was resolved as
3 part of the Portillo case, and that includes \$100,000,
4 approximately, that was seized at the bus station.

11:48 5 It was an odd plea process. There was no
6 written plea agreement, it was an oral plea, because of the
7 strange information that we received right after opening
8 statements; and, so, the defense lawyers wanted their
9 clients to enter a plea quickly, and Judge Hughes wanted a
11:49 10 plea entered. So, there is no written plea agreement.
11 There is a document filed later that addresses -- that I
12 believe is a preliminary order of forfeiture.

13 THE COURT: So, obviously, Mr. Portillo, serving a
14 lengthy sentence, I assume --

11:49 15 MR. JOHNSON: Yes. Well, he hasn't been sentenced
16 yet, but his range is life.

17 THE COURT: So, there was obviously a decision made
18 to defer sentencing in the hope that he might provide
19 additional information and, from his perspective, earn an
11:50 20 opportunity for a lower sentence.

21 MR. JOHNSON: Correct.

22 THE COURT: Okay. Sentencing still not scheduled?

23 MR. JOHNSON: I think it may be tentatively
24 scheduled, but it's --

11:50 25 THE COURT: -- for after this matter.

1 MR. JOHNSON: -- postponed until this proceeding is
2 over.

3 THE COURT: So, obviously, Mr. Portillo even has a
4 lot of incentive to testify -- and this will be the subject
11:50 5 of cross-examination -- to testify adversely to his prior
6 lawyer, Mr. Fisch, and his prior lawyer's client, Mr. Fisch.
7 It's sort of a double whammy. This case gets more and more
8 interesting.

9 MR. JOHNSON: I don't think Portillo has a problem
11:50 10 testifying against Fisch at this point even though that's
11 his prior lawyer. Obviously, there is no love lost there.

12 But I don't think he has any problem with the
13 representation he received from Mr. Silverman back at that
14 time. In fact, he wanted Mr. Silverman to continue as his
11:51 15 lawyer in the criminal case, but Mr. Silverman didn't
16 because of a separate conflict -- not a conflict between the
17 forfeiture proceeding and the criminal proceeding but a
18 conflict between a representation that Silverman had
19 undertaken for another defendant.

11:51 20 THE COURT: In the criminal proceeding?

21 MR. JOHNSON: I believe so.

22 THE COURT: Does the fact that Mr. Portillo has not
23 yet been sentenced and is testifying in the hope of a lower
24 sentence when that occurs -- does that impact in any way the
11:51 25 conflict analysis that I have to deal with?

1 MR. JOHNSON: Well, I would say that Portillo
2 should not be placed in the unfair position of having his
3 former lawyer cross-examine him, who he had a confidential
4 relationship with and who he might be concerned confidential
11:52 5 information could be used against him. I think that --

6 THE COURT: Well, I guess here's my question. What
7 kind of continuing duty, if any, does Mr. Silverman have to
8 Mr. Portillo, whose goal is to testify truthfully,
9 obviously -- at least that's the question you're going to
11:52 10 ask him -- favorably to the government when Mr. Silverman
11 represents the defendant and Mr. Silverman's goal is to have
12 Mr. Portillo's testimony redound favorably to Mr. Fisch?

13 MR. JOHNSON: I think the main --

14 THE COURT: My question is continuing obligations
11:53 15 owed by Mr. Silverman despite the fact that the
16 representation has formally ended four years ago.

17 MR. JOHNSON: I think there's a continued
18 obligation to keep confidential the communications between
19 lawyer and client, and those survive the representation.

11:53 20 THE COURT: Any other duties that continue?

21 MR. JOHNSON: There is a general duty of -- I think
22 there is a general duty of loyalty, but --

23 THE COURT: That's my question. Because the entire
24 point of avoiding the -- of determining whether there is a
11:53 25 conflict or whether to accept a waiver of a conflict is to

1 ensure the right to representation that is free from divided
2 loyalties.

3 So, that's the question. Are there divided
4 loyalties?

11:53 5 MR. JOHNSON: I think the rules -- you know, the
6 rules do allow a former lawyer to represent someone against
7 their former client in certain circumstances -- you know, if
8 the matters are not related -- under those circumstances.
9 So, there's not an absolute duty of loyalty. It's narrowly
11:54 10 based on what the particular circumstances are; and, so, I
11 think it comes all the way back around to what the facts of
12 the situation are.

13 THE COURT: Confidential information and the
14 subject matter of the representation.

11:54 15 MR. JOHNSON: Right. The closeness of the subject
16 matter.

17 THE COURT: Clearly, Fisch and Portillo have
18 totally divergent interests, conflicting interests, here.

19 MR. JOHNSON: Portillo doesn't have a problem
11:54 20 testifying.

21 THE COURT: Again, that's my point, because -- And
22 if Mr. Silverman is hampered in his ability to cross-examine
23 Mr. Portillo in attempting to protect Mr. Fisch, that would
24 be, in part, your argument about divided loyalty and
11:55 25 improper --

1 MR. JOHNSON: And that affects his representation
2 of Mr. Fisch.

3 THE COURT: Anything else on that that would be
4 helpful for me to consider?

11:55 5 MR. JOHNSON: I would just say that, you know, if
6 it turns out the Court finds there is a conflict, I think
7 the possible ways to resolve it are either Mr. Fisch
8 continues representing himself on his own, as he's done
9 previously for the last --

11:55 10 THE COURT: For 14 months.

11 MR. JOHNSON: -- few years, a couple years at
12 least. That's option one.

13 Option two is that he could hire another
14 lawyer. I, frankly, would be concerned about another lawyer
11:56 15 coming in at this point and having about one week to
16 prepare. I think that would be asking for a problem. I
17 think the Court would need to give the new lawyer at least
18 the same amount of time that Mr. Silverman had, and the
19 Court has already found that under the circumstances of this
11:56 20 case that would be an adequate amount of time. What I think
21 is not --

22 THE COURT: Mr. Silverman had significant knowledge
23 about the case, evidence, at the time we had the hearing
24 last week. I'm not sure how long it took him to get that
11:56 25 knowledge.

1 MR. JOHNSON: I think what is not a good option is
2 postponing the case for months for a new lawyer to be hired,
3 which, you know, the Court has basically already ruled on
4 that the other day at the continuance hearing.

11:56 5 But there's no reason to think that this issue
6 of who is the lawyer going to be is going to stop just
7 because we get another lawyer in the case. That lawyer
8 could then be fired at the last minute, and then we're right
9 back to who is the lawyer going to be.

11:57 10 So, I think we need to resolve it. Whatever
11 way it's going to be, I don't think there should be a long
12 continuance as a result.

13 Thank you, Your Honor.

14 THE COURT: All right. Thank you.

11:57 15 Mr. Silverman -- Well, actually, first,
16 counsel for Mr. Portillo, please.

17 MS. MUSICK: I was going to say "Good morning." I
18 think it's "Good afternoon."

19 THE COURT: We're on the cusp.

11:57 20 MS. MUSICK: Yes.

21 First, I would just like to say, without sort
22 of rehashing everything, I don't disagree with anything that
23 the government has said thus far. The forfeiture --

24 THE COURT: I don't think I have ever heard you say
11:57 25 that before.

1 MS. MUSICK: Probably not.

2 The exhibits from the trial with
3 Mr. Portillo's -- in his own case -- you know, a great deal
4 of the government's evidence dealt with that forfeiture and
11:58 5 sort of how the investigation started to evolve into
6 Mr. Portillo. So, obviously, it's something that we weren't
7 prepared to litigate at trial.

8 And kind of as the government explained, the
9 trial -- that we started the trial and then it fell apart
11:58 10 there and we ended up with a plea.

11 The Court is correct. We're waiting on
12 sentencing. Mr. Portillo, obviously, does have interest in,
13 you know, testifying in this particular matter because, you
14 know, potentially, that could affect his sentencing in Judge
11:58 15 Hughes's court.

16 One thing that -- from Mr. Portillo's
17 perspective -- he and I have discussed this, and he has
18 indicated to me that he discussed this matter, including the
19 forfeiture -- or around the forfeiture with Mr. Silverman.
11:58 20 And so --

21 THE COURT: Wait. Define "this matter".

22 MS. MUSICK: The forfeiture matter with
23 Mr. Silverman when Mr. Silverman was first hired to
24 represent Mr. Portillo back in 2000-2001.

11:59 25 THE COURT: Okay.

1 MS. MUSICK: His position to me has been that he
2 shared information with Mr. Silverman about that case and
3 the underlying facts of the forfeiture.

4 THE COURT: And that -- I understand you're being
11:59 5 careful in the way you're talking, and I appreciate your
6 need to respect the confidentiality and the privilege, but
7 is your -- am I understanding you correctly that your
8 client's position is that, in talking with Mr. Silverman
9 about the forfeiture, he provided information that also bore
11:59 10 on the criminal case in which Mr. Fisch represented him?

11 MS. MUSICK: Yes, Your Honor. And my client has --
12 was originally at that -- As the forfeiture began and
13 Mr. Silverman was representing him, when the criminal
14 indictment came down, the original idea was to continue to
12:00 15 have Mr. Silverman represent him. So, there were some
16 discussions there.

17 THE COURT: So, basically, the conversation was
18 about the core underlying facts that gave rise to both the
19 forfeiture and the criminal case?

12:00 20 MS. MUSICK: Correct. Down the road that became an
21 issue when the indictment fell.

22 THE COURT: Right. Because the conversations with
23 Mr. Silverman continued about the indictment?

24 MS. MUSICK: Correct. There were conversations
12:00 25 about the indictment. Mr. Silverman recognized a conflict.

1 THE COURT: And the conflict was what?

2 MS. MUSICK: Within the criminal case. And I'm not
3 aware of that particular conflict. I know Mr. Silverman
4 mentioned to me that there were conflicts so that he could
12:01 5 not continue to represent Portillo in the criminal case,
6 something that was unknown at the time of the forfeiture.

7 That would be something Mr. Silverman would
8 know. I didn't get into that, as to what the actual
9 conflict was.

12:01 10 So, Mr. Portillo was unable to hire
11 Mr. Silverman at that point on the criminal indictment.

12 THE COURT: How far after the indictment did this
13 occur?

14 MS. MUSICK: I am not exactly sure of the time
12:01 15 line, but Mr. Silverman then got Mr. Portillo in contact
16 with Stan Schneider, who --

17 THE COURT: So, maybe we could pinpoint that date.
18 Do you know when that was?

19 MS. MUSICK: I do not. But Stan signed on to the
12:01 20 case pretty close to the indictment time.

21 THE COURT: So, just within months? Weeks?

22 MS. MUSICK: Probably weeks. That's my
23 recollection.

24 THE COURT: Do you know the date when
12:02 25 Mr. Schneider --

1 MR. PEARSON: We have got the docket here from the
2 Portillo case.

3 THE COURT: Yeah. Why don't you tell me when Stan
4 Schneider made his appearance in the criminal case in
12:02 5 relation to when the indictment issued.

6 MR. JOHNSON: Portillo was arrested on the
7 complaint April 24, 2006. Schneider appeared -- Stanley
8 Schneider appeared for Portillo on April 28th, 2006.

9 THE COURT: So, several weeks later.

12:02 10 MR. JOHNSON: Well, four --

11 MS. MUSICK: Actually, four days later.

12 MR. JOHNSON: -- four days later.

13 THE COURT: I'm sorry. I missed it. It's four
14 twenty --

12:02 15 MR. JOHNSON: 4-28 Schneider appeared.

16 THE COURT: What was the date of the arrest?

17 MR. JOHNSON: 4-24.

18 THE COURT: A couple of days. You're right.

19 MR. SILVERMAN: Actually, it was exactly a couple
12:02 20 of days, Your Honor. Mr. Schneider first appeared on 4-26.

21 MR. JOHNSON: That's right.

22 THE COURT: Got it. Thank you.

23 MR. SILVERMAN: Yes, Your Honor.

24 MR. JOHNSON: And the indictment was filed
12:03 25 May 22nd, 2006.

1 THE COURT: Got it.

2 MR. JOHNSON: And was there another date?

3 THE COURT: Go ahead. When was the next lawyer who
4 appeared?

12:04 5 MR. JOHNSON: Dick DeGuerin appeared July 12th,
6 2006.

7 All right. So, Mr. Fisch moves to substitute
8 as counsel for Portillo November 22nd, 2006. The order to
9 substitute is signed on --

12:04 10 MS. MUSICK: -- 4-3-2007.

11 MR. JOHNSON: Well, he substituted on November 27th
12 '06, and then he is terminated by court order April 3rd,
13 2007. And then David Adler is appointed May 4th, '07, and
14 eventually Miss Musick is appointed. But that's essentially
12:05 15 it.

16 THE COURT: Got it. That chronology is helpful.

17 MS. MUSICK: If it matters at all, Your Honor, once
18 I was appointed -- and I am trying to recall that date. I
19 was on the case for approximately a month, six weeks. I was
12:05 20 subbed out by retained counsel, Mr. Scott Shearer, and then
21 when Mr. Shearer withdrew I was reappointed on Mr. Portillo.

22 THE COURT: Very good.

23 MS. MUSICK: And if I may, Your Honor, just one
24 other thing I made note of as you were discussing this with
12:06 25 the government.

1 You asked about a continued duty to
2 Mr. Portillo. And just -- I know the Court had mentioned
3 possibly being able to sort of segregate that and have
4 Mr. Silverman, you know, "filter" himself if he were, you
12:06 5 know, to cross-examine and not include certain things.

6 I do think he has a duty not to disclose the
7 information that he has learned from Mr. Portillo or from
8 his representation of Mr. Portillo, but I think it extends
9 further than just not repeating that information or
12:06 10 disclosing that information. I think it goes to not being
11 able to use that information in any way, not to develop
12 trial strategy, not to develop, you know, other witnesses.
13 I think that information is -- it's privileged and
14 confidential and can't be used for any purpose whatsoever,
12:07 15 including trial strategy.

16 I just wanted to -- I kind of made a note of
17 that as something that the Court might want to consider.

18 THE COURT: That's helpful. Thank you.

19 Okay. Anything else that would be useful from
12:07 20 this side? And then I will hear from Mr. Silverman.

21 MR. JOHNSON: No, Your Honor.

22 THE COURT: Mr. Silverman.

23 MR. SILVERMAN: Yes, Your Honor.

24 All right. So, I want to clear up the factual
12:07 25 basis surrounding the circumstances, but, as a threshold

1 matter before doing that, I wanted to deal with the Court's
2 earlier statement that I had done something wrong by
3 disclosing --

4 THE COURT: Well, I was concerned about it. I
12:07 5 didn't find any --

6 MR. SILVERMAN: I want to address that.

7 THE COURT: I didn't find anything wrong as a
8 formal finding. I was raising it so that you would have the
9 opportunity to specifically address it.

12:08 10 MR. SILVERMAN: Yes, Your Honor.

11 When I received Document 186, the Court's
12 order directing me to respond to the suggestion that a
13 conflict existed, I read that the conference will cover the
14 extent of Silverman's previous representation of the
12:08 15 potential witness. And there was a briefing deadline,
16 which, of course, I had blown. We have talked about that.
17 But, at any rate, I wanted to fairly and fully respond to
18 that and make the Court aware of the extent of my
19 representation of Mr. Portillo so that the Court could make
12:08 20 a just decision on this issue, and I thought that that would
21 have compelled me to disclose the extent of my relationship
22 with Mr. Portillo. That's all I was attempting to do.

23 You know, when issues like this come up,
24 privilege versus full disclosure, it's always a sticky
12:09 25 matter.

1 THE COURT: Yes, it is.

2 MR. SILVERMAN: But I was just trying to make the
3 Court aware of the circumstances in my prior representation.

4 THE COURT: And I think that's one of the issues
12:09 5 that identify what can be divulged, in the interest of the
6 disclosure and effective cross-examination, as opposed to
7 what can't be divulged, no matter how helpful, no matter how
8 illuminating, because of the privilege constraint that I
9 think is, as you say, sticky.

12:09 10 MR. SILVERMAN: Yes, Your Honor. Absolutely. And,
11 so, that's what I am prepared to talk about.

12 Of course, the question of what can be
13 divulged during the trial and during cross-examination is
14 different than the question that we were talking about just
12:10 15 now, which was when a court orders someone to divide the
16 full extent --

17 THE COURT: I did not order the disclosure of
18 privileged communications.

19 MR. SILVERMAN: I understand. So, let's talk about
12:10 20 whether those were, in fact, truly privileged
21 communications.

22 First of all, the time line. I was not
23 representing Mr. Portillo in 2001, didn't know who he was,
24 didn't represent him in 2002, did not represent Mr. Portillo
12:10 25 at the time he made a claim to this money. His lawyer at

1 that time was David Bires.

2 Several days before Mr. Portillo and Mr. Bires
3 were scheduled for trial on the forfeiture Mr. Bires
4 withdrew because, I guess, he had a conflict. And, so, that
12:11 5 is how I came to represent Mr. Portillo. I replaced
6 Mr. Bires, and that was in 2003, if my memory serves me
7 correctly.

8 When I met with Mr. Portillo he provided
9 documentation -- or he actually referenced -- explained that
12:11 10 this money was legal money, and then some friends or family
11 members or people that worked supporting his band provided
12 documents that tended to, in my --

13 THE COURT: Are you describing to me what
14 Mr. Portfolio told you in your meeting with him when you did
12:11 15 become his lawyer?

16 MR. SILVERMAN: I am describing to you what I filed
17 in his case and what I turned over to the government and the
18 government's theory. You know, there's supposed to be a
19 specific complaint raised. Silverman will have to
12:12 20 cross-examine the witness on a particular issue. That's
21 what the burden is of the person asserting a harmful
22 conflict of interest.

23 And, so far, the only thing I have heard is
24 that Silverman would be able to say that Portillo offered an
12:12 25 explanation for his possession -- or for his ownership of

1 the funds. Because they weren't seized from Portillo. They
2 were seized from two other people who told the police it was
3 Portillo's money.

4 The government is maintaining, because
12:12 5 Silverman was provided with a false exculpatory story for
6 the origin of the money, that that would be the source of
7 the conflict and that Silverman would then be able to
8 cross-examine the witness with a false statement that no
9 other lawyer would ever be able to have.

12:13 10 Well, if that is, in fact, the case -- The
11 materials I turned over to Miss Kempner are in the
12 possession of the government. Those ought to be turned over
13 to any lawyer under *Brady* because they tend to show that
14 Mr. Portillo gave a false exculpatory explanation for his
12:13 15 ownership of the currency, and that is impeaching and that
16 is *Brady*. And, so, I'm not in any better position than any
17 other defense lawyer handling this matter should be.

18 THE COURT: I guess the question is whether you
19 will be in any worse position because you will be unable to
12:13 20 use anything you might have learned in the attorney-client
21 relationship that would be covered by confidentiality and
22 privilege.

23 MR. SILVERMAN: I would think -- Well, first of
24 all, I wouldn't have any desire to introduce evidence or
12:13 25 testimony to the effect that I had been Mr. Portillo's

1 lawyer. That doesn't favor Fisch and it's not necessary.

2 The fact of the exculpatory story is
3 marginally relevant, if at all. This is not a case about a
4 forfeiture. This is a case about an alleged obstruction of
12:14 5 justice by representation that either bribes would be paid
6 and the parties knew they wouldn't be paid, or it's a case
7 about alleged representations that the government would be
8 able to use information on a high level provided by
9 Mr. Portillo and others when, in fact, that was false and
12:15 10 the information was never provided to the government.

11 While the government's case against Portillo
12 might very well have started out with the seizure in the bus
13 station from the Mendoza people, that seems to me to be very
14 tangential and very marginally related at all to the
12:15 15 allegations against Mr. Fisch.

16 Mr. Fisch, if he wishes to, I would think,
17 could waive the appearance of a conflict, because we
18 maintain there is no actual conflict and he has, in my
19 pleading, indicated that that's what he wishes to do.

12:15 20 And, so, the question is are these matters
21 substantially related and do they give rise to an actual
22 conflict.

23 You know, I went over this all weekend,
24 because the civil cases go differently than the criminal
12:16 25 cases and yet you see civil cases, you know, citing -- you

1 see criminal cases occasionally citing civil cases on this
2 issue.

3 What I deduced from all of this, on Sunday,
4 was that in criminal cases the Sixth Amendment right to the
12:16 5 lawyer of one's choice can only be interfered with or in any
6 way impeded in the face of an actual conflict, and in this
7 case I don't perceive there to be an actual conflict. The
8 reason I say that is because of the *Burns* decision.

9 In the *Burns* decision the analysis performed
12:16 10 by the circuit court was to determine whether there was an
11 actual conflict. I have a copy. Here's a copy of the *Burns*
12 case.

13 THE COURT: Thank you.

14 MR. SILVERMAN: It's interesting and, I would
12:17 15 think, dispositive of this issue that Mr. Fisch himself
16 represented Mr. Portillo and pursuant to that representation
17 Mr. Fisch debriefed Mr. Portillo not just about the
18 forfeiture but about all relevant conduct that the
19 forfeiture was a small part of. Mr. Portillo, I am
12:18 20 imagining, told Mr. Fisch things well beyond the forfeiture;
21 and, so, the information that I would receive from Mr. Fisch
22 would be much more complete than any information I received
23 from Mr. Portillo regarding the forfeiture.

24 If Mr. Portillo or the government or
12:18 25 Mr. Portillo's lawyer would enlighten us as to what his

1 precise claim is beyond the fact that 'Mr. Silverman
2 advanced a false exculpatory justification for currency I
3 claimed to own' and, by the way, Mr. Silverman didn't
4 lightly -- even in the face of any exculpatory documents
12:19 5 provided, Mr. Silverman still contacted an independent
6 forensic financial expert to review what Mr. Portillo was
7 claiming and seeing if it, in fact, made sense, and that
8 expert tended to agree that there was a time line of events
9 that made sense and that Mr. Portillo's claim was a
12:20 10 plausible one. So, Mr. Silverman was very cautious in
11 asserting the claims of Portillo and making sure that they
12 were, in fact, corroborated.

13 The Court had inquired as to the basis that
14 prevented Silverman from representing Portillo. Let me
12:20 15 address that.

16 Silverman briefly represented a witness at the
17 time when the agents of the DEA had just left his home and
18 wanted to question him. The witness consulted counsel. And
19 Mr. Silverman, upon hearing the witness's story, advised the
12:21 20 witness to refrain from further conversations with the
21 government agents. And Mr. Silverman sent a letter to the
22 DEA instructing them that he was that witness's lawyer for
23 this purpose and that the witness wished to invoke his right
24 to counsel and right to remain silent.

12:21 25 There was another defendant that Mr. Silverman

1 represented in another federal district that was arrested in
2 possession of a large sum of U.S. currency, and Silverman
3 litigated that Defendant's forfeiture in state court, went
4 up through the appellate process, obtained a reversal in the
12:22 5 court of appeals. Then the federal government indicted the
6 person for money laundering.

7 Silverman filed and litigated a motion to
8 suppress the evidence, which was ultimately successful. A
9 part of the evidence in that case suggested that the trailer
12:22 10 that that witness was pulling was actually owned or
11 registered to another person listed in the Portillo
12 indictment.

13 And, so, once all of this came to light, it
14 was apparent that I couldn't participate in Mr. Portillo's
12:22 15 case; and, so, I contacted Mr. Schneider and I arranged for
16 Mr. Schneider to visit with Mr. Portillo. I explained to
17 Mr. Portillo that Stanley Schneider was my first boss when I
18 was in law school and I had a great deal of confidence in
19 him, and I strongly urged Mr. Portillo to enlist
12:23 20 Mr. Schneider as his lawyer, and he followed the advice.

21 If I had any inkling that my two-day
22 representation of Mr. Portillo on his criminal case and my
23 several-week representation of Mr. Portillo on his
24 forfeiture case --

12:23 25 THE COURT: How many weeks did you represent him on

1 the forfeiture case?

2 MR. SILVERMAN: Several weeks. Technically -- on
3 the forfeiture, I was, technically, on it for a number of
4 years.

12:23 5 THE COURT: Correct.

6 MR. SILVERMAN: But what I actually did is I subbed
7 in and gathered the documents and sent the documents to
8 Mr. Angelillo, the forensic accountant, and --

9 THE COURT: How many meetings did you have with
12:24 10 Mr. Portillo?

11 MR. SILVERMAN: One, I believe, and on the
12 forfeiture, because I think it was someone else that brought
13 the documents to me. And the reason I say that is because
14 there was a little summary sheet and it says 'Mr. Portillo
12:24 15 this' and 'Mr. Portillo that,' describing the documents.
16 And, so, it wasn't Portillo, then, that was providing those.
17 It was the person that gave me the summary sheet, which was
18 necessary to me because the documents were in Spanish
19 mostly.

12:24 20 And, so, then when the indictment came down in
21 the criminal case I --

22 THE COURT: So, you only had one meeting?

23 MR. SILVERMAN: On the forfeiture.

24 THE COURT: Did you have other conversations in
12:24 25 which they weren't face-to-face meetings but --

1 MR. SILVERMAN: I don't think I had them with
2 Mr. Portillo. I think I had them with his representatives.
3 He had managers and different people that were familiar with
4 the circumstances surrounding his exculpatory justification
12:25 5 for owning the money.

6 I don't have a specific recollection, but if
7 somebody called me and said, 'I am charged in a federal
8 felony,' I would have certainly -- I think I would have
9 immediately gone to see that person, and I probably did.

10 THE COURT: So, one meeting on the --

11 MR. SILVERMAN: -- on the criminal. I would think
12 I would have done that right away.

13 And I am certain that -- I have a specific
14 recollection about accompanying Mr. Schneider to
12:25 15 Mr. Portillo's initial appearance just in order to make sure
16 that Mr. Portillo was happy with Mr. Schneider, but I don't
17 think I really talked to Mr. Portillo then. I do remember
18 talking to Mr. Braley from the U.S. Attorney's Office and
19 telling Mr. Braley that I concurred with the idea that I
12:26 20 shouldn't handle Mr. Portillo's case and that's why
21 Mr. Schneider would be handling it.

22 So, as I said, the forfeiture case was stayed
23 and I was the last lawyer on it. So, I would have been the
24 lawyer, technically, for three or four years, but I didn't
12:26 25 do anything on it. There was nothing to be done.

1 And when the money was ultimately forfeited to
2 the government, I didn't resist or oppose that in any way
3 because I wasn't Mr. Portillo's lawyer; and I just assumed
4 that either Mr. DeGuerin or Miss Musick, or whoever the
12:27 5 lawyer was, was the person in the position to decide what
6 the best disposition for the funds in that case were. And,
7 so, I had nothing whatever to do with that decision.

8 The Exhibit 9, that is the claim that David
9 Bires filed. I didn't make the decision with Mr. Portillo
12:27 10 about whether he should, in fact, make a claim to the
11 currency. All I did was put the evidence together that
12 supported the claim that had been made, and that evidence
13 was turned over to Sue Kempner. And, so, that evidence --
14 if the government's theory is that Mr. Portillo was not
12:27 15 truthful to me, then the government should tell any defense
16 lawyer that handles that case that Mr. Portillo made a false
17 statement about that so that he could be impeached.

18 I don't hear any other assertion of conflict
19 here. If there is -- I don't want to do something wrong
12:28 20 here. I don't want to be in a bad position of being in a
21 conflict of interest. That's why I showed you everything I
22 had. I want to do the right thing by Mr. Fisch. I want to
23 do the right thing by Mr. Portillo.

24 I'm not entirely certain to what degree
12:28 25 Mr. Fisch's innocence depends on whether Mr. Portillo told

1 the truth when he filed his claim with Mr. Bires or whether
2 he told the truth when he provided those documents. I don't
3 know if the documents are genuine or an alternate source.

4 People that enter into plea agreements
12:29 5 oftentimes agree to fold winning hands on sub-issues as part
6 of a plea agreement even if they really were in the right on
7 those issues. I don't fault anybody for making those
8 choices. I have made them myself in the past on other
9 cases.

12:29 10 But, at the end of the day, this is a case
11 against Fisch that is a case of obstruction of justice, and
12 it's Mr. Portillo and Mr. Imo and Mr. Herrera and it
13 involves this government operative, Mr. Williams, that made
14 representations that the jury would decide whether Fisch
12:30 15 reasonably believed or didn't believe.

16 It seems to me that whether Mr. Portillo
17 innocently had money or had drug money just is a very minute
18 part of the case against Mr. Fisch. I don't know if it's
19 entirely necessary to even go into it from the defense
12:30 20 perspective.

21 If the Court felt that it was necessary, we
22 could certainly consider enlisting the services of yet
23 another lawyer to conduct the examination of Mr. Portillo,
24 and I certainly do not mind --

12:31 25 THE COURT: Doesn't the fact that Mr. Portillo has

1 been presented or described to me as such a critical witness
2 affect the analysis and not tangential to the prosecution
3 against Mr. Fisch?

4 MR. SILVERMAN: No. I think not. It's my
12:31 5 understanding that Mr. Portillo is the only government
6 witness -- or Mr. Portillo was in jail at all times; so,
7 Mr. Portillo didn't actually physically do things. But I
8 understand the Portillo case is the only case that actually
9 has money going to Fisch and his trust account and then from
12:31 10 Fisch to Lloyd Williams.

11 And, if I am wrong about that, I am sure the
12 government will let us know. I am just trying to digest
13 this voluminous amount of material; and, so, if I misspeak
14 something, it's just out of ignorance of the subject matter.
12:32 15 I am doing the best I can.

16 I will tell the Court also that now, based on
17 this conflict, I have spent the entire weekend reading cases
18 and trying to figure out if there really was a conflict and
19 if I would be in the wrong for attempting to represent
12:32 20 Mr. Fisch in light of what was raised.

21 The allegations were not sufficiently precise,
22 as the case law requires. So, I have been trying to think
23 of every permutation. And I actually thought of the
24 possibility, 'Well, gosh. Maybe I would want to impeach
12:32 25 Mr. Portillo with the fact that he falsely gave an innocent

1 explanation at an earlier time.' And after really thinking
2 about that long and hard -- I don't know if I -- I don't
3 think I -- I certainly wouldn't want to prove I was his
4 lawyer, and I don't -- I think the value of it is just --
12:33 5 pales in comparison to the issues at hand in this case, the
6 big issues.

7 But, yes, I can see that Mr. Portillo would
8 be -- Mr. Portillo and, I am imagining, Mrs. Portillo and
9 other people surrounding Portillo, the Portillo story, would
12:33 10 be a very large part of the government's case.

11 Now, another thing that I ran across while I
12 was doing this is the fact that -- If I am getting out of
13 the bounds of what the Court wants to now discuss, just tell
14 me and I'll stop.

12:34 15 THE COURT: Don't worry.

16 MR. SILVERMAN: But Mr. Hinton, according to these
17 302 forms, was --

18 THE COURT: Well, this goes to your notice of
19 potential conflict with respect to Mr. Hinton.

12:34 20 MR. SILVERMAN: Yes.

21 THE COURT: I think that's a separate issue, and
22 we'll take it up, obviously, and deal with it, but I don't
23 think it bears on my resolution of your representation of
24 Mr. Fisch.

12:34 25 MR. SILVERMAN: Okay. Does the Court wish to have

1 Fisch affirmatively waive the conflict?

2 THE COURT: I first need to make a determination of
3 actual conflict because that triggers the *Garcia* hearing. I
4 think that's the right order in which to proceed.

12:34 5 MR. SILVERMAN: Okay. Well, if we're going to get
6 into -- because there is no motion to disqualify me. This
7 is sort of an investigation that we're all conducting now
8 into the basis --

9 THE COURT: An abundance of caution hearing.

12:35 10 MR. SILVERMAN: Right. An abundance of caution
11 hearing. Good name.

12 Okay. So, I am going to request, then, if
13 this blossoms into some sort of a *Garcia* situation, that
14 either Mr. Portillo, through his lawyer or the government
12:35 15 through its lawyers, specifically apprise me of exactly the
16 areas that they fear that this conflict would be harmful to
17 Mr. Portillo so that I can, number one, determine whether I
18 agree or disagree and, number two, what I would do in light
19 of these things. I am kind of shooting in the dark and I
12:35 20 have done everything I can.

21 You had asked the government what the best
22 case was for them. I want to give it to you because I want
23 you to be able to make a fully informed and fair decision
24 here.

12:35 25 I read the *Phillips* case which Judge Atlas

1 wrote. And that was the situation where Mr. Nugent was
2 attempting to represent one defendant who was, I think, in
3 charge and Mr. DeGuerin, a lawyer in Mr. Nugent's office,
4 had previously tried another defendant. And that was a
12:36 5 situation where one of those defendants -- Well, neither one
6 was passed because Mr. DeGuerin's client was convicted on
7 appeal, if I am remembering correctly.

8 Does the Court have *the Phillips* case at hand?
9 I have a copy if you don't.

10 THE COURT: Just give me the cite.

11 MR. SILVERMAN: All right. It's 952 Federal
12 Supplement 480, 1996.

13 And, so, both the appeal of the previously
14 convicted defendant and the present defendant's trial were
12:37 15 being handled by the same law firm, and the defendant on
16 appeal also was to be a witness for the government, and that
17 defendant objected to the conflict. Judge Atlas resolved
18 the issue against the representation of the Nugent client
19 that was then to go to trial.

12:37 20 I have read this opinion, and this is the one
21 that took so much time to go through and read the precedence
22 relied upon by Judge Atlas in reaching her decision. The
23 question of substantial relation is one of the stickiest
24 issues.

12:38 25 THE COURT: Yes. It says the cases say it is fact-

1 dependent.

2 MR. SILVERMAN: Right.

3 The *American Airlines* decision is the decision
4 that I think basically distills the analysis on
12:38 5 substantially connected or substantially related.

6 What *American Airlines* says is that, if they
7 are substantially related, that's almost the end of the
8 story. You know, according to *American Airlines*, it creates
9 an irrebuttable presumption that there is an actual conflict
12:39 10 of interest.

11 And, so, I was trying very hard to reconcile
12 this with the *Burns* decision, and what I -- I may be wrong,
13 but what I have come up with is that the *American Airlines*
14 analysis is not really the analysis for criminal cases. I
12:39 15 think that, in light of the *Gonzalez-Lopez* decision, which
16 reaffirms the right to the lawyer of choice, and then the
17 *Kyler* decision that's cited within *Burns*, I was of the
18 impression that, because we're dealing with the Sixth
19 Amendment in criminal cases, the analysis is actually -- the
12:39 20 analysis in the *Burns* case is the correct analysis. And, of
21 course, the *Burns* case is decided about twelve years after
22 Judge Atlas issued her thoughtful opinion.

23 THE COURT: Have you looked at *United States v.*
24 *Lucio*?

12:40 25 MR. SILVERMAN: No.

1 THE COURT: It's an April 13, 2013, decision by
2 Judge Hanen.

3 MR. SILVERMAN: Can you give me the cite?

4 THE COURT: I can give you the Westlaw cite. It is
12:40 5 2013 Westlaw 1701065.

6 It does deal with a criminal case. The facts
7 are different. In that case there was a clear indication on
8 the part of the defendant's counsel to circumscribe
9 cross-examination of a witness who had been a prior client
12:40 10 of the lawyer.

11 MR. SILVERMAN: What was the outcome of that, Your
12 Honor?

13 THE COURT: Disqualification for both actual and
14 potential conflict.

12:40 15 MR. SILVERMAN: All right.

16 THE COURT: Very lengthy discussion of the
17 applicable standards, disciplinary rules, model rules and
18 common-law.

19 MR. SILVERMAN: All right. I did not read that
12:41 20 one, but I would like the opportunity to read that one and
21 analyze it --

22 THE COURT: I am inclined to think that we ought to
23 do this. Why don't we recess for 45 minutes -- or we can
24 make it an hour so you can grab something to eat as well,
12:41 25 have you all look at this case -- it may or may not be

1 helpful -- it certainly is thorough -- in a criminal case
2 and very recent -- and then to bring to my attention after
3 the recess any additional arguments you want to make.

4 MR. SILVERMAN: Yes, Your Honor.

12:41 5 MR. JOHNSON: Yes, Your Honor.

6 MR. DOYLE: Your Honor, could you rule on my
7 motion?

8 THE COURT: Your motion to withdraw?

9 MR. DOYLE: Yes, Your Honor.

12:42 10 THE COURT: When we come back.

11 MR. DOYLE: Okay.

12 THE COURT: All right? I take it nobody will say
13 anything with respect to that motion.

14 MS. CRISWELL: We have no objection.

12:42 15 MR. JOHNSON: No objection.

16 THE COURT: All right. Never mind. I will grant
17 it.

18 MR. DOYLE: Thank you, Your Honor.

19 THE COURT: All right. You don't have to come
12:42 20 back.

21 All right. One hour. Thank you.

22 MR. PEARSON: Thank you, Judge.

23 (Lunch recess)

24 THE COURT: Did y'all have a chance to read the
13:59 25 cases?

1 MR. JOHNSON: Yes, Your Honor.

2 MR. SILVERMAN: Yes, Your Honor.

3 THE COURT: All right. Is there anything you want
4 to add on that before I turn it back to the government?

13:59 5 MR. SILVERMAN: Yes.

6 THE COURT: Go ahead.

7 MR. SILVERMAN: So --

8 THE COURT: By the way, in the civil cases: We
9 have run into a real need for an extended hearing in a
13:59 10 criminal case.

11 (Off the record)

12 MR. SILVERMAN: Back on the record. Norm Silverman
13 for Mr. Fisch.

14 This case is an excellent illustration of what
13:59 15 appears to be a genuinely unwaivable conflict of interest
16 both because of the subject matter of the conflict, the
17 nature of the two conflicts that it presents, and the
18 unwillingness of the defendant to pick a horse and ride it.
19 As the judge said in this opinion, this defendant was trying
14:00 20 to have his cake and eat it, too. This defendant was trying
21 to turn the threat of a conflict of interest into a sword
22 and use it to his tactical advantage.

23 This judge that wrote this opinion is
24 exactly -- is a patient individual that took all measures
14:00 25 not to interfere with Lucio's right to a lawyer of his

1 choice.

2 The facts are convoluted, but at the end of
3 the day, Blalock is a lawyer representing Lucio, a thug that
4 was -- or an alleged thug that was attempting to, according
14:01 5 to this indictment, intimidate Judge Limas into not
6 discussing the fact of an escape, even though it was on a
7 court record, and Judge Limas had supposedly, in exchange
8 for campaign funds, agreed to remain silent about the facts
9 of the escape.

14:01 10 It's a strange convoluted fact pattern.
11 Blalock is intercepted on, I guess, a T3 or some sort of a
12 wire intercept having a discussion with Judge Limas where --
13 and in the discussion, where Blalock is also a campaign
14 person for the judge, Blalock brings up the fact that,
14:01 15 'People that would give money to your campaign are concerned
16 about the fact that this escape occurred while you were on
17 the bench. Why don't you just release the transcript?' And
18 the judge replies, "I can't."

19 So, that statement "I can't" and what it means
14:02 20 to the litigation as a whole is, obviously, a central issue
21 in the trial of Lucio. The government, I think, wants to
22 draw the implication in that case that the reason Judge
23 Limas can't release the transcript is because there's some
24 sort of a secret agreement not to talk about it.

14:02 25 I image the witness -- looking at Blalock as a

1 witness, Blalock could lend context one way or the other to
2 what the statement means. That's all I can adduce from the
3 facts of this case.

4 That is a completely -- not just a different
14:02 5 planet. It is a different universe light years away from
6 what's going on in the case of United States v. Fisch.

7 In Fisch, the allegation, as I understand it,
8 is that a person, Lloyd Williams, represented himself to
9 have entrée to high-ranking officials, a lawyer in the
14:03 10 Department of Justice named "Ron McNeil" that was the lead
11 drug prosecuting lawyer in the United States, an FBI agent
12 named "Dick Miller", someone else named "McGauley" and
13 someone named "King" in Medicare. Williams represented that
14 he had been a longtime operative serving various enforcement
14:03 15 branches of the Department of Justice and, as a result of
16 his service to his country, he had unique ability to cause
17 the Department of Justice to give sentencing consideration
18 to defendants that supplied information helpful to the
19 government.

14:04 20 There are, I believe, five witnesses, slash,
21 convicted defendants in this case that all claim that
22 representations about Lloyd Williams' ability to affect
23 their sentences were made to them. The lawyer, not
24 necessarily an attorney of record -- but the government
14:04 25 alleges that in all of those instances Fisch was a lawyer

1 that talked to or in some way was involved with these
2 various defendants. The government alleges in its
3 indictment that a Defendant Herrera was one of the subjects,
4 a Defendant Imo was another and the Defendant Portillo was
14:04 5 another.

6 The Defendant Portillo would testify that he
7 caused monies to be paid to Williams through Fisch through
8 Fisch's trust account and that, rather than receive
9 consideration and a reduced sentence from Ron McNeil or some
14:05 10 other high-ranking Justice Department official, he arrived
11 one morning to find himself and his wife in trial before
12 Judge Lynn Hughes.

13 Portillo has pled guilty to a major narcotics
14 trafficking conspiracy, apparently. The fact that Portillo
14:05 15 is a convicted drug felon is no secret. It's part of the
16 case.

17 Portillo claims a conflict arising out of
18 Silverman's representation of Portillo eight years ago on a
19 criminal forfeiture which the government contends is
14:06 20 relevant to the prosecution of Portillo. Well, the
21 prosecution of Portillo has been completed. He hasn't been
22 sentenced yet but has already pled guilty.

23 I am imagining that the hundred thousand
24 dollars taken from the Mendozas in the bus station was the
14:06 25 least of Mr. Portillo's problems in that indictment. My

1 basis for saying that is nothing I learned from
2 Mr. Portillo, certainly, as I had disclosed to the Court,
3 once when I represented other people, not knowing anything
4 about Mr. Portillo -- I am aware of the facts of those other
14:06 5 people's cases, and when those people or people related to
6 them -- when their names appeared in Mr. Portillo's
7 indictment, I immediately did not represent Mr. Portillo
8 because that was a conflict.

9 Now, in the case against Fisch, to assert
14:07 10 that -- Oh. And, so, Mr. Portillo -- As we now stand, the
11 theory of the conflict is Silverman will somehow refrain
12 from vigorously cross-examining Portillo, and the precise
13 issue in the painstaking review, as it's put, that we're
14 supposed to be making now -- the precise nature of the
14:07 15 conflict is Portillo lied to Silverman about the lawfulness
16 of the money. The basis for that is that Portillo agreed to
17 the forfeiture of the money at the time he agreed to plead
18 guilty. The government is asking the Court to connect the
19 dots and to say, well, if he pled guilty or if he agreed to
14:08 20 forego his claim to the forfeiture, that must mean the money
21 was illegal in the first instance.

22 That does not necessarily follow. The
23 prosecution is free to demand a defendant agree with or
24 agree not to contest any part of the case when that person
14:08 25 decides to plead guilty. You can forego claims that might

1 independently be legal and valid but, as part of a plea
2 agreement for a greater good, one agrees to forego making
3 those claims. This is not all -- It's not about the
4 truthfulness or falsity of it. It's just a decision that
14:08 5 was made in the course of this person's case.

6 The basis of the conflict is supposedly that
7 Silverman would forego cross-examining Portillo about what
8 the government now wants to infer were false claims that the
9 money was innocently derived and had, as its reason for
14:09 10 being in the form of U.S. currency on two people in a bus
11 station, a legitimate purpose.

12 That is so many orders of magnitude removed
13 from the controversy and the questions raised by Fisch's
14 relationship with Williams that it is an infinitesimally
14:09 15 small part of a very large case involving many, many people.
16 This is not the type of thing that is substantial or
17 substantially related in any way to the allegations for
18 which Fisch is on trial.

19 You know, the issues in Fisch's case are was
14:10 20 Lloyd Williams actually capable of delivering what he
21 promised? Did Fisch in some way solicit a bribe? Did Lloyd
22 Williams discuss with Fisch that this was a bribery scheme?
23 Or did Fisch -- Was Lloyd Williams actually going to deliver
24 the results is one question. The next question is did Fisch
14:10 25 reasonably believe that Williams was going to make entrée

1 into the highest echelons of the Justice Department in order
2 to get consideration for these defendants. And the next
3 part of it is was the -- were the defendants ever informed
4 that, rather than paying Lloyd Williams for this
14:11 5 introduction, Lloyd Williams not being a law officer, that
6 in fact the money was being used to bribe people; and if the
7 defendants believed that, was that as a result of something
8 Fisch said or did. I mean, that's what this case is about.

9 This "conflict" is just simply not one. It's
14:11 10 not a conflict. And when you see what a real conflict looks
11 like and the way that the conflict is manipulated by the
12 Lucio defense time to try to preserve error and at the same
13 time assert their Sixth Amendment right -- I mean, that's
14 gamesmanship and that's not what we're about here.

14:11 15 I am trying to defend Abraham Fisch. Fisch is
16 completely and fully willing to waive any conflict. I won't
17 refrain from cross-examining about relevant matters. I
18 won't cheat Fisch out of what the Sixth Amendment guarantees
19 him. That is not --

14:12 20 These two cases are completely and
21 diametrically opposed. The issues are -- there's just no --
22 I can't say no commonality, but it is so tangential as to
23 not be worth all the effort we're expending on it, I think.

24 I guess that's a good place to stop. Right?
14:12 25 Okay.

1 THE COURT: All right. Thank you.

2 Mr. Johnson or --

3 MR. JOHNSON: Mr. Pearson.

4 THE COURT: Mr. Pearson.

14:12 5 MR. PEARSON: Thank you, Judge. I drew the short
6 straw; so, I am happy to talk about these.

7 THE COURT: Not just the cases but also respond to
8 the points that have --

9 MR. PEARSON: Absolutely.

14:13 10 I'll start where defense counsel left off,
11 which was his statement that he's not going to refrain in
12 his cross-examination of Mr. Portillo, and I think that puts
13 a fine point on the conflict of interest that is here.

14 The facts of *Lucio* are different in that the
14:13 15 conflict was created by the presence of the lawyer in that
16 case on the recorded telephone call. So, the particular
17 issue was the witness advocate rule. But the law that is
18 laid out there is, I think, really helpful because that
19 shows how the courts engage in the kind of analysis when you
14:13 20 have got either an actual or a potential conflict and then
21 what to do in those circumstances.

22 The discussion of the law centers on another
23 case which actually is very similar to this case and that's
24 *Infante*. And *Infante* involved, basically, this situation
14:14 25 where the defense attorney representing a client had

1 previously represented two of the cooperating witnesses who
2 testified against that client -- I think it was a narcotics
3 trial -- and the defense attorney did not cross-examine
4 those witnesses as vigorously as he could, and the Fifth
14:14 5 Circuit reversed the conviction for an inquiry into whether
6 or not there was prejudice from the conflict of interest.

7 And the portion of *Infante* that sort of
8 highlights this issue is quoted in *Lucio* where it says
9 "Foster" -- once his former clients took the stand to
14:14 10 testify against Infante, "Foster was put in a position
11 conducive to divided loyalties," and that's the particular
12 phrase that the Fifth Circuit keeps coming back to. "There
13 is a conflict of interest when the defense attorney is put
14 in the position that's conducive to divided loyalties,"
14:15 15 because he had to choice between vigorously cross-examining
16 his former clients, which might jeopardize their chances of
17 the government filing a Rule 35 motion on their behalf, and
18 not vigorously cross-examining them, which would risk
19 allowing the government to establish through their testimony
14:15 20 an essential element of the case against Infante.

21 And if you apply that principle to this
22 situation -- It's very likely that Mr. Portillo is going to
23 take the stand in the case against Defendant Fisch. There's
24 no guarantees, but we expect that Mr. Portillo is going to
14:15 25 say that Mr. Fisch, along with Mr. Williams, told him that

1 the over one million dollars Portillo was paying was in part
2 going to be used to pay public officials.

3 And if Defendant Fisch wishes to contest that
4 assertion, his counsel, Mr. Silverman, is going to be in the
14:16 5 position of putting on an effective and vigorous
6 cross-examination of Mr. Portillo. And, so, he's going to
7 be put in, it seems to me to be, that same position that the
8 attorney in *Infante* was in factually and, from a legal
9 standpoint, the position that Mr. Lucio's counsel was in in
14:16 10 the *Lucio* case, and that is in that position conducive to
11 divided loyalties.

12 I am happy to go into a little bit more of the
13 details, but that's sort of the issues that we have
14 particularly identified that is our concern.

14:16 15 In *Infante* -- and this is for the Court's
16 edification -- the factual difference was there the
17 defendant in that case -- they didn't go through a *Garcia*
18 hearing; so, there wasn't clarity on the issue of whether or
19 not the defendant was intending to waive conflict-free
14:17 20 representation. So, it got sent back for that.

21 So, our concern is both the cross of
22 Mr. Portillo and respecting the obligations Mr. Silverman
23 has to Portillo but, also, with respect to Defendant Fisch,
24 the conflict but, also, the right to effective counsel.

14:17 25 The concern that we would have is, if

1 Mr. Fisch is going to say, 'I am going to waive any
2 conflict-free representation from Mr. Silverman,' that
3 whether he's also in some sense waiving his right to
4 effective assistance if the cross is somehow cabined in a
14:17 5 way that wouldn't impact Portillo's own -- or the
6 obligations from Mr. Silverman to Mr. Portillo.

7 Thank you.

8 MR. SILVERMAN: Make I just have just a second to
9 respond?

14:18 10 THE COURT: You may.

11 MR. SILVERMAN: Thank you.

12 If the government means to suggest that there
13 was a reference made to Portillo's possible Rule 35 --

14 THE COURT: Well, I think here -- I mean, he hasn't
14:18 15 been sentenced yet.

16 MR. SILVERMAN: Right. Or a Rule 5K1 or they call
17 it the 35, but I know what they mean; a downward departure
18 motion in whatever form.

19 If the government is trying to suggest that
14:18 20 Portillo might admit something on the stand while he's a
21 sworn witness in response to my cross that would then harm
22 Mr. Portillo's ability to receive that consideration, that's
23 just ludicrous. This witness is sworn to tell the truth.
24 It doesn't matter whether it's me, Dan Cogdell, Mike Hinton
14:19 25 asking -- it doesn't matter who is asking the questions.

1 Portillo has to tell the truth.

2 And for the government to say, 'Well, you told
3 the truth, but it didn't suit us' -- well, that's just not a
4 proper use of the downward departure motion.

14:19 5 THE COURT: I'm not sure that that's the
6 government's argument.

7 MR. SILVERMAN: Okay. Well, I am just making sure
8 because I got that inference from it, and maybe I'm --

9 THE COURT: That's certainly not the analysis used
14:19 10 in *Infante* or in the *Lucio* case that cites it in the
11 analysis.

12 MR. SILVERMAN: Okay. In that case --

13 THE COURT: It's the problem presented by the fact
14 that you have got a former client who is testifying in a way
14:19 15 that will hurt a present client and the divided loyalties,
16 the conflict of interest that that creates.

17 MR. SILVERMAN: Your Honor, just from my
18 representation --

19 THE COURT: You can't hurt one without hurting the
14:20 20 other. You can't advance one without hurting the other.

21 MR. SILVERMAN: Mr. Portillo -- And with all
22 respect to everyone involved in this, whatever hurt has been
23 done to Mr. Portillo -- He has pled.

24 THE COURT: That doesn't -- That's not the point.
14:20 25 His sentencing is outstanding.

1 MR. SILVERMAN: Right.

2 THE COURT: He hopes to have a lower sentence --

3 MR. SILVERMAN: Yes.

4 THE COURT: -- by testifying truthfully, yes, but

14:20 5 to the extent your cross-examination is meant to undercut

6 the force of his testimony and lower -- it is contrary to

7 his interests by promoting Mr. Fisch's interests. If you

8 are respectful of Mr. Portillo's interests, the problem is

9 that that may then limit your effective representation of

14:20 10 Mr. Fisch.

11 So, the problem is that their interests are

12 divergent, and to the extent -- and this is a question --

13 you still owe duties of loyalty as well as duties of

14 confidentiality to Mr. Portillo, that's the either actual or

14:21 15 potential conflict. That's what we're talking about.

16 That's what I understood *Lucio* and *Infante* to talk about.

17 MR. SILVERMAN: I had asked the Court, when I moved

18 for a continuance, to provide me access to the actual

19 criminal file on Portillo and on the other witnesses so that

14:21 20 I would know all the discrete acts the government contended

21 they had performed in their various cases. I am imagining

22 that that file would contain much more than a hundred-

23 thousand-dollar-in-cash seizure not made for Mr. Portillo.

24 THE COURT: I don't think that's the point either.

14:21 25 That bears on -- That is a way -- Your point about the

1 hundred thousand dollars in relation to what Mr. Portillo
2 pleaded guilty to, that's a way of describing your view of
3 the lack of substantial relationship between your
4 involvement in representing Mr. Portillo and the current
14:22 5 case involving Mr. Fisch, but I don't think that it bears on
6 the conflict issue otherwise.

7 MR. SILVERMAN: Okay. The subject matter of the
8 statements or documents provided on Portillo's behalf
9 tending to show the money is innocent -- I think the Court
14:23 10 can agree with me that the relevance on that precise issue,
11 to the notion that this is contrary to Portillo's interests,
12 is that -- The government draws the inference the statements
13 made, the evidence presented, were not truthful. Okay?
14 That means it's impeaching. I turn that over to a
14:23 15 government lawyer --

16 THE COURT: You turned over the confidential
17 communications your client made to you during your
18 representation of him?

19 MR. SILVERMAN: Yes, because I believed them to be
14:23 20 true and exculpatory on the money. I turned them over to
21 Miss Kempner when I was trying to resolve Mr. Portillo's
22 forfeiture.

23 THE COURT: Statements that Mr. Portillo made you
24 turned over?

14:24 25 MR. SILVERMAN: There are no statements beyond what

1 the documents represent. That's it. Mr. Portillo said, 'I
2 am a famous musician. I was buying a tour bus. That's what
3 this money was for. Here's how I earned it. Here's the
4 receipts from where different bands played at my nightclub
14:24 5 and here's receipts' --

6 THE COURT: Your argument has now shifted to: I
7 don't have any confidential communications.

8 MR. SILVERMAN: No. I have what I have tendered to
9 the Court. There was no discussion of Mr. Portillo being a
14:24 10 drug dealer. There was a discussion of how terrible it was
11 that, just because this was in currency instead of some form
12 of check, that the government had seized it.

13 I turned over all the evidence to the
14 government. Any lawyer is going to have the same
14:24 15 information that was provided on Portillo's behalf that I
16 turned over to Miss Kempner years ago. It's *Brady*.

17 If they're now claiming that that's drug
18 money, then the fact that Portillo said otherwise and
19 Portillo is a witness against Fisch, it's *Brady*. It's
14:25 20 impeachment.

21 So, there is no reason to remove me, as any
22 other lawyer would have the same motivations.

23 THE COURT: Let me hear the government's response
24 to just that argument and then anything else you want to add
14:25 25 you may.

1 MR. SILVERMAN: Yes, Your Honor.

2 THE COURT: So, the argument now, as I understand
3 it, is Mr. Silverman didn't learn anything that he hasn't
4 turned over to the government and, therefore, it has lost
14:25 5 whatever confidentiality it has. I think that's the
6 argument.

7 MR. PEARSON: And, so, there's no longer -- I think
8 the problem is that, to sign on to that, you would have to
9 sign on to the idea that it's just a question of whether or
14:26 10 not there has been any confidential communications.

11 THE COURT: Well, that is a factor.

12 MR. PEARSON: Sure. Absolutely. I think the
13 broader question is whether or not defense counsel can do
14 both jobs, can be in a position to provide effective
14:26 15 representation of the defendant and also maintaining his --
16 If he's saying there is no longer any confidential
17 communications, then maybe the duty of confidentiality isn't
18 there anymore, but I think defense counsel also just -- I
19 mean, he just told the Court what his client came in and
14:26 20 said to him. And, so, even crossing Mr. Portillo about
21 simple things like 'Are you a drug dealer?' -- I mean, he
22 presumably discussed that topic with Mr. Portillo.

23 So, I'm not trying to -- but accepting that
24 premise of there's no confidential communications, that
14:27 25 doesn't seem to fit with the facts that we know of.

1 THE COURT: Anything else, Mr. Silverman?

2 MR. SILVERMAN: No. I'm not going to beat a -- go
3 over ground we have already covered.

4 THE COURT: All right.

14:27 5 MS. MUSICK: May I add something on behalf of my
6 client just very briefly --

7 THE COURT: Sure.

8 MS. MUSICK: -- on behalf of Mr. Portillo?

9 These were some notes that I actually made
14:27 10 earlier before we broke for lunch when Mr. Silverman was
11 discussing his position.

12 Basically, as I understood his position -- and
13 it's changed just a little bit here this afternoon -- is he
14 gathered a lot of his information from representatives of
14:27 15 Mr. Portillo and from other sources who provided

16 information. Mr. Portillo's position is that's all part of
17 the attorney-client relationship. So, the duty is not only
18 to not disclose your confidential communications with your
19 client but the duty not to disclose those matters which you
14:28 20 learn about through representation of your client. So, we
21 believe it's a broader issue than just confidential
22 communications.

23 I have written down -- and it was not as
24 articulate as the *Infante* and *Lucio* cases. I had written
14:28 25 down, you know, "continued duty to not harm his client."

1 More artfully said, as the Court just said,
2 there is that divided loyalty. And, so, I just wanted to
3 sort of reiterate that on behalf of Mr. Portillo. He
4 believes there is continued duty not to cause him harm going
14:28 5 forward even though he is now a former client.

6 MR. SILVERMAN: I told you I would shut up and I
7 really want to, but....

8 Portillo turned over the documents or Portillo
9 caused the documents to be turned over to Silverman with
14:28 10 full knowledge that those documents would be presented to
11 the government in an effort to get the money back. And, so,
12 whatever happened then, that was waived, and it didn't get
13 unwaived now just because Portillo got indicted, because I
14 have already done what I was supposed to do and turned the
14:29 15 documents over to the government.

16 And, so, this just seems to me to -- There is
17 no conflict arising out of that representation.

18 THE COURT: I think that the order in which I need
19 to address the issues is as follows. I have to first
14:29 20 determine an actual conflict, whether there is one. If
21 there is one, I have to hold a *Garcia* hearing, which is
22 basically to ensure that Mr. Fisch, in fact, does what
23 Mr. Silverman and Mr. Fisch have already informed me he
24 does, which is to waive any conflict. And even if I find
14:30 25 that there is a knowing and intelligent waiver of what I

1 find to be an actual conflict, then I have to determine
2 whether I should, nonetheless, exercise my discretion and
3 authority to disqualify Mr. Silverman because of an either
4 actual conflict that I don't think can appropriately or
14:30 5 should be waived or because of a potential conflict that I
6 do not believe should be waived.

7 And that would then open the question of, if
8 Mr. Silverman is indeed disqualified from continuing to
9 represent Mr. Fisch, although Mr. Silverman has done so
14:30 10 formerly for a very brief period, the implications for the
11 schedule that we have now.

12 So, let me address these issues as best I can.
13 They have come up -- ironically, in a case that is as old as
14 this case, they have come up in a compressed and
14:31 15 eve-of-trial fashion that requires an efficient but thorough
16 review.

17 The cases that the parties have pulled
18 together and that we have been able to find I think lay out
19 the applicable law, and I don't think there is any dispute
14:31 20 as to the legal standards that govern the analysis.

21 There is also no dispute that these cases are
22 difficult for, I think, two reasons. One is that, as a
23 number of the thoughtful opinions that have been brought to
24 my attention make clear, what we're trying to do here is
14:32 25 balance two aspects of a constitutional right. One is the

1 right to be represented by counsel of one's choice. That
2 has been a theme throughout this case in different ways.
3 And the second is the right to be represented not only by
4 counsel one chooses but, also, by counsel whose
14:32 5 representation will be effective, will be conflict-free.

6 These are described in the cases as
7 corresponding rights. They both are surrounded in the Sixth
8 Amendment, but both have to be honored. And the court's
9 obligation is not only to ensure that counsel of choice is
14:33 10 respected but, also, that the limits on that right are
11 respected. Those limits are the independent duty to ensure
12 that criminal defendants have a trial consistent with the
13 Sixth Amendment, which requires an effective advocate as
14 opposed merely to a chosen advocate; and, if those are
14:33 15 inconsistent, then the chosen advocate has to cover.

16 The court's obligation, also, in part, rests
17 on the integrity of the system, which is an abstract but
18 important concept. Fleshing it out in the details required
19 by this posture is the challenge.

14:34 20 So, we have those competing judicial duties,
21 we have these competing interests, and we recognize that
22 there is a presumption, in the balance, in favor of counsel
23 of one's choosing, a presumption that may be overcome by an
24 actual conflict of interest or a showing of a serious
14:34 25 potential for conflict.

1 So, the first question is the question of
2 whether there is an actual conflict of interest present.
3 And here the cases recognize that not only is the analysis
4 complicated and difficult because of the tension between
14:35 5 right to counsel of choice and the need to ensure effective
6 conflict-free counsel but because each of these cases is
7 heavily fact-dependent. Heavily. Extrapolating from one to
8 the other is difficult. And to say that this case presents
9 unusual facts is certainly an understatement, but each of
14:35 10 the cases that gives rise to these eve-of-trial conflict
11 situations also seems unusual.

12 So, the Fifth Circuit has found some basis for
13 extrapolation and generalization. The criteria for
14 identifying whether there is an actual conflict have been
14:35 15 laid out by the cases: whether there is confidential
16 information helpful to one client but harmful to another,
17 whether and how closely the subject matter of the multiple
18 representations is related, whether the prior representation
19 is unambiguously terminated.

14:36 20 Quoting the *Infante* case, which was cited
21 again in the *Lucio* case as well as the more recent *Hernandez*
22 case, 690 F.3d 613 --

23 MR. SILVERMAN: Could you say that cite again.
24 690 --

14:36 25 THE COURT: -- 613.

1 MR. SILVERMAN: Thank you.

2 THE COURT: *United States v. Hernandez.*

3 All of these talk about a division in counsel
4 loyalties when there are divergent or competing interests
14:36 5 between a former client and a current client. And, clearly,
6 we have that here. We have divergent interests between a
7 former client and a current client. Undeniable. We have a
8 current client who does not want to be convicted. We have a
9 former client who is going to testify against the current
14:37 10 client in the hope of the opportunity for a lower sentence
11 on his criminal case.

12 The first question: Does Mr. Silverman have
13 confidential information helpful to one client but harmful
14 to another? Second and a related question: How closely the
14:37 15 subject matter of the multiple representations is, what's
16 the substantial overlap here between the forfeiture
17 proceeding and the current -- and the criminal case against
18 Mr. Portillo and, therefore, this case.

19 I think it's most helpful to look at the
14:37 20 second question first.

21 On the second question, although Mr. Silverman
22 has worked hard to minimize the relationship between the
23 forfeiture proceeding and the later criminal case that was
24 the basis of the testimony that will be offered against
14:38 25 Mr. Fisch, at the end of the day I don't think Mr. Fisch and

1 Mr. Silverman succeeded.

2 The forfeiture case arose out of the same
3 facts, same events, same activities, that became the basis
4 for the criminal indictment. And when Mr. Portillo, through
14:38 5 yet another former counsel, made a claim to those proceeds
6 and Mr. Silverman represented him in pursuing that claim, as
7 Mr. Silverman acknowledged, I believe, the subject was where
8 did the money come from, and that was the basis of the
9 criminal indictment, where did this and other money come
14:39 10 from. Was it proceeds? Was it something else? Paying
11 people to ferry money around. Obviously, closely related to
12 the set of issues that became the basis of the criminal
13 indictment.

14 And the government's point that the evidence
14:39 15 of the seizure that was the forfeitures -- the role of that
16 evidence in the criminal trial against Mr. Portillo, I
17 think, makes the point crisper. Does Mr. Silverman have
18 confidential information from Mr. Portillo?

19 Mr. Silverman, again, said, 'Well, I only met
14:40 20 with him once on the forfeiture and then it went dormant.
21 And then I only met with him on the indictment once and then
22 I got conflicted-out. And I set him up with Mr. Schneider
23 and was gone. And anything that I learned from Mr. Portillo
24 I gave to the government because it was all helpful to
14:40 25 Mr. Portillo.'

1 Obviously, we're measuring information that's
2 hard to -- we're testing descriptions that are hard to test.

3 We have Mr. Silverman saying, 'I only learned
4 stuff that was helpful and I cheerfully and with the consent
14:41 5 of my client disclosed it all. I got no confidential
6 information that hasn't already been divulged.' That asks
7 me to assume that this was a pretty one-dimensional set of
8 exchanges.

9 I have no way to know -- and neither do you,
14:42 10 Mr. Silverman -- if, in the examination of Mr. Portillo,
11 information that Mr. Portillo or his representatives
12 authorized to speak as his agents for the purpose of
13 obtaining legal advice -- I have no basis to know if, in the
14 examination or if right now, there is other information that
14:42 15 reveals Mr. Portillo's lack of truthfulness, his failure to
16 recall accurately, his willingness to make statements that
17 are incomplete truths or that are misrepresentation by
18 virtue of omissions. There is simply no way to compare
19 what, in fact, he told you, others acting on his behalf told
14:43 20 you, and what was then memorialized and what was sent to the
21 U.S. Attorney's Office or placed on the record in a plea
22 colloquy.

23 What we do know is that Mr. Portillo is going
24 to be testifying about his criminal case that grew out of
14:43 25 the proceeding that you represented him in, and it will be

1 important to Mr. Fisch to have Mr. Portillo's truthfulness
2 undermined. We do know that. That is a choice between
3 vigorously cross-examining Mr. Portillo on the truthfulness
4 and completeness of his testimony or muting that
14:44 5 examination, avoiding any area that would undermine
6 Mr. Portillo's truthfulness, credibility, in order to act in
7 a fashion consistent with his desire to obtain a more
8 favorable sentencing outcome.

9 *Infante* cited in *Lucio* sums it up crisply.

14:45 10 Once his former clients took the stand to testify against
11 *Infante*, Foster, the lawyer, was put in a position conducive
12 to divided loyalties. He had to choose between vigorously
13 cross-examining his former clients, which might jeopardize
14 their chances of the government filing a Rule 35 motion on
14:45 15 their behalf, and not vigorously cross-examining them, which
16 would risk allowing the government to establish, through
17 their testimony, an essential element of the case against
18 *Infante*. Thus, Foster, the lawyer, labored under a conflict
19 of interest."

14:46 20 That is, structurally, what we have here. And
21 unless I can find an absence of confidential information
22 helpful to one client but harmful to another, we have not
23 only a breach of the duty of confidentiality. We also have
24 a conflicting loyalty, and there are continued duties of
14:46 25 loyalty to Mr. Portillo owed even though there are -- in

1 part owed because this is not a case in which the subject
2 matters are so isolated or distant from each other that the
3 duty is simply not implicated.

4 The prior representation has unambiguously
14:47 5 been terminated; so, that does weigh in favor of finding no
6 actual conflict. But the relationship does not weigh in
7 favor of finding no actual conflict.

8 The opportunity for getting confidential
9 information was clearly present, clearly present, over a
14:47 10 period that may have been relatively short, given the long
11 period of dormancy of the case but reawakened when the
12 criminal indictment came down, and there was another meeting
13 that you have described with your client as well -- that is,
14 prior to the indictment being issued when he was arrested on
14:48 15 a complaint.

16 So, on this record, I think it is very
17 difficult not to find an actual conflict and it's even more
18 difficult not to find a potential conflict.

19 The potential conflict is even more pressing
14:48 20 because of the likelihood that none of us can predict with
21 any confidence whether or when -- In the course of the
22 presentation of Mr. Portillo's testimony or Mr. Portillo's
23 answers on cross-examination, the usefulness of information
24 that he divulged during your representation of him,
14:49 25 Mr. Silverman, may become vivid, may become pressing, and at

1 that point we would be in the middle of the
2 cross-examination. The potential for that to occur, I
3 think, is inescapable and is a serious problem.

4 But, having found an actual conflict, I think
14:49 5 my next step is to have the *García* hearing. So, I need to
6 have Mr. Fisch answer questions relating to his waiver.

7 Mr. Fisch, raise your right hand, please.

8 DEFENDANT FISCH: Can I come up?

9 THE COURT: You may.

14:49 10 Do you solemnly swear that the testimony you
11 will give before this court will be the truth, the whole
12 truth and nothing but the truth, so help you, God? Or you
13 may affirm.

14 DEFENDANT FISCH: I affirm.

14:50 15 THE COURT: Go ahead and take the stand.

16 I am going to ask questions and then both
17 sides may follow up.

18 MR. SILVERMAN: Yes, Your Honor.

19 THE COURT: Basic questions.

14:50 20 Mr. Fisch, would you tell me your name,
21 background, very briefly.

22 DEFENDANT FISCH: Abraham Fisch. Background?

23 THE COURT: You're how old now?

24 DEFENDANT FISCH: 55 now.

14:50 25 THE COURT: Do you have a JD --

1 DEFENDANT FISCH: Yes, Your Honor, I do.

2 THE COURT: -- as well as an undergraduate degree?

3 All right. How long did you practice law?

4 DEFENDANT FISCH: I am going -- I just started my

14:50 5 29th year.

6 THE COURT: And, obviously --

7 MR. SILVERMAN: I am just trying to hear him.

8 THE COURT: That's fine. You can move up if you
9 need to.

14:50 10 Obviously, this testimony is limited to the
11 purpose of this hearing.

12 DEFENDANT FISCH: Should I just talk here?

13 THE COURT: That's fine.

14 DEFENDANT FISCH: All right.

14:50 15 THE COURT: Now, Mr. Fisch, you're familiar with
16 the notice of the conflict in this case that the government
17 filed?

18 DEFENDANT FISCH: Yes, ma'am.

19 THE COURT: All right. And, as I understand the
14:50 20 position that your lawyer has made clear on your behalf and
21 the -- and you yourself have made clear, in filing through
22 an affidavit just late last week -- is it your position that
23 you are waiving any possible -- any conflict of interest
24 that Mr. Silverman may have because he previously
14:51 25 represented Mr. Portillo, who is going to be a witness

1 against you in this case?

2 DEFENDANT FISCH: Yes, Your Honor.

3 THE COURT: I need to ask the standard questions.

4 Are you currently under the influence of any

14:51 5 drugs or any alcoholic beverages?

6 DEFENDANT FISCH: No, Your Honor.

7 THE COURT: Are you addicted to any drugs or any
8 alcoholic beverage?

9 DEFENDANT FISCH: No, Your Honor.

14:51 10 THE COURT: Are you taking any medications?

11 DEFENDANT FISCH: Yeah, I take some medications.

12 Yes.

13 THE COURT: Do you take any medications that affect
14 your ability to see and understand what's going on around
14:51 15 you?

16 DEFENDANT FISCH: No, ma'am.

17 THE COURT: Have you had any recent changes in the
18 dosage or frequency of the medication?

19 DEFENDANT FISCH: No, ma'am.

14:52 20 THE COURT: Any side effects?

21 DEFENDANT FISCH: No, ma'am. No, Your Honor.

22 THE COURT: Are you sick in any way?

23 DEFENDANT FISCH: No, Your Honor.

24 THE COURT: You understand and you heard me express
14:52 25 my concerns about the problem that your lawyer,

1 Mr. Silverman, may face if Mr. Portillo testifies and
2 Mr. Silverman has to cross-examine him?

3 DEFENDANT FISCH: Yes, Your Honor.

4 THE COURT: You understand that Mr. Silverman,
14:52 5 although he no longer represents Mr. Portillo, continues to
6 owe Mr. Portillo duties of respecting confidential
7 communications and privileged communications?

8 DEFENDANT FISCH: We have discussed it, Your Honor.
9 Yes.

14:52 10 THE COURT: You understand that?

11 DEFENDANT FISCH: Yes, ma'am.

12 THE COURT: And you understand that, even if
13 confidential information that Mr. Silverman has as a result
14 of representing Mr. Portillo would be useful to you,
14:53 15 Mr. Silverman could not use it in cross-examining
16 Mr. Portillo?

17 DEFENDANT FISCH: I understand that, Your Honor.

18 THE COURT: And do you understand that
19 Mr. Silverman also owes Mr. Portillo certain duties of
14:53 20 continued loyalty and cannot affirmatively act in ways that
21 may be harmful to Mr. Portillo --

22 DEFENDANT FISCH: Yes, Your Honor.

23 THE COURT: -- to his legal interests?

24 DEFENDANT FISCH: Yes, Your Honor.

14:53 25 THE COURT: And you understand that Mr. Portillo is

1 not testifying because his interests and your interests are
2 congruent?

3 DEFENDANT FISCH: I know that. Yes, ma'am.

4 THE COURT: You understand that Mr. Portillo's
14:53 5 testimony is intended to lead to your conviction?

6 DEFENDANT FISCH: Yes, Your Honor.

7 THE COURT: And that the government believes that
8 Mr. Portillo has evidence that can establish the elements of
9 one or more of the counts against you?

14:53 10 DEFENDANT FISCH: That's what they believe, Your
11 Honor. Yes.

12 THE COURT: All right. And you understand that
13 cross-examination would, therefore, be directed towards
14 exposing him as someone who lies, who is not entitled to
14:54 15 credibility, who is simply doing this out of self-interest
16 and who should not be given any benefit from his testimony?

17 DEFENDANT FISCH: I understand that, Your Honor.

18 THE COURT: So, your interests and Mr. Portillo's
19 interests are deadly opposed. Right?

14:54 20 DEFENDANT FISCH: Yes, Your Honor.

21 THE COURT: All right. And, therefore,
22 Mr. Silverman has a choice. You understand that?

23 DEFENDANT FISCH: I do.

24 THE COURT: All right. And those kinds of
14:54 25 conflicts, those kinds of choices, can deny you your right

1 to effective assistance of counsel. You understand that?

2 DEFENDANT FISCH: Yes, Your Honor.

3 THE COURT: You understand you're entitled to that?

4 DEFENDANT FISCH: I do.

14:54 5 THE COURT: Mr. Silverman might object or offer
6 evidence that would help -- he might object to evidence that
7 would hurt you but could help make the case that
8 Mr. Portillo is attempting to make, Mr. Silverman might
9 offer evidence that could help you but could hurt
14:55 10 Mr. Portillo, or he might be unable to do either of those
11 because of his duties of loyalty to Mr. Portillo. Do you
12 understand that?

13 DEFENDANT FISCH: And I'm not trying to be
14 disrespectful, Your Honor. If you could put it in context,
14:56 15 because how you put it is a little --

16 THE COURT: Sure. There might be a document that
17 exposes Mr. Portillo to be a liar that Mr. Silverman might
18 have obtained through his representation of Mr. Portillo or
19 independently. That choice of whether to offer that
14:56 20 document into evidence could implicate the same kind of
21 duties of loyalty, conflicting duties, that we talked about
22 earlier. Do you understand that?

23 DEFENDANT FISCH: Yes, Your Honor. In that
24 context, yes.

14:56 25 THE COURT: Again, potentially infringing effective

1 representation if Mr. Silverman is constrained from taking
2 positions on evidence that he otherwise would have taken?

3 DEFENDANT FISCH: That would be contrary to my
4 Sixth Amendment rights, Your Honor.

14:57 5 THE COURT: Yes. You understand that?

6 DEFENDANT FISCH: I do, Your Honor. I do.

7 THE COURT: And is it your desire, Mr. Silverman --
8 Mr. Fisch -- excuse me -- even in the face of all of these
9 risks, to, nonetheless, have Mr. Silverman continue to
14:57 10 represent you?

11 DEFENDANT FISCH: I do, Your Honor.

12 THE COURT: Mr. Silverman, according to the
13 position you have taken, is new to this case, relatively.

14 DEFENDANT FISCH: Yes, Your Honor.

14:57 15 THE COURT: And, yet, despite the fact that you did
16 not even decide, apparently, to have him appear on your
17 behalf until recently, you're, nonetheless, willing to
18 accept divided loyalty, conflicting interests, in the
19 representation that he provides?

14:57 20 DEFENDANT FISCH: Yes, Your Honor.

21 THE COURT: You understand why that seems a little
22 bit odd, that someone who you didn't even hire until very
23 recently -- at least for the purpose of a formal
24 appearance --

14:58 25 MR. SILVERMAN: Judge, let me just clear that up,

1 if I may. He didn't hire me until recently at all. There's
2 no back story to this. I truly was retained right when I
3 made my appearance.

14:58 4 THE COURT: That's fine. That makes my point even
5 stronger.

6 MR. SILVERMAN: Yes.

7 THE COURT: Mr. Silverman didn't even appear on the
8 scene, according to what he just said, until very recently
9 and, yet, you are that committed to having him and no other
14:58 10 lawyer represent you even if that other lawyer would be free
11 of any conflicts or any divided loyalties?

12 DEFENDANT FISCH: Can I tell you why, Your Honor?
13 In my mind, Mr. Silverman is the hardest working attorney I
14 have ever been around. He has spent 15, 16 hours a day
14:59 15 since he has become my attorney. Nobody -- I trust him
16 fully with my life, Your Honor, because of his background
17 and his ability and his caring in this matter.

18 THE COURT: Even though you just hired him
19 recently?

14:59 20 DEFENDANT FISCH: Yes, Your Honor.

21 THE COURT: You have, obviously, known him for
22 years.

23 DEFENDANT FISCH: I have known Mr. Silverman for a
24 long time, Your Honor. Yes, I have. That's correct.

14:59 25 THE COURT: Have you talked to any other lawyers

1 about whether it is advisable to have a lawyer representing
2 you who represented someone who is likely to be a very
3 important witness against you?

14:59 4 DEFENDANT FISCH: I'm sorry, Your Honor. I
5 didn't --

6 THE COURT: You sought independent counsel on this
7 question?

8 DEFENDANT FISCH: No, I have not, Your Honor.

9 THE COURT: Obviously, you yourself are a lawyer.

15:00 10 DEFENDANT FISCH: Yes, Your Honor.

11 THE COURT: Is it your intent, knowing what you
12 know, after having thought about it at length --

13 DEFENDANT FISCH: Yes, Your Honor.

14 THE COURT: -- to waive your rights to a different
15:00 15 lawyer or to continue to represent yourself, as you did for
16 an extended period, in order to have Mr. Silverman represent
17 you despite the conflict of interest?

18 DEFENDANT FISCH: Yes, Your Honor.

19 THE COURT: Questions, Mr. Silverman?

15:00 20 MR. SILVERMAN: I want to -- Your Honor, I want to
21 ask the Court a question, if I could, before I step in
22 something I don't want to.

23 May I globally ask this witness, who the
24 record already establishes served as Mr. Portillo's lawyer
15:01 25 on the very indictment that Mr. Portillo has pled guilty

1 to -- may I ask this witness if Mr. Portillo divulged to
2 this witness sensitive matters that then the lawyer Fisch
3 would be fully within his right to disclose to me as his
4 counsel without opening the door --

15:01 5 THE COURT: I'm not going to rule on whether it
6 opens any doors or not, but you can ask whatever question
7 you think is appropriate to the proceeding.

8 I told some of the civil cases that were here
9 earlier that we're obviously in the middle of something
15:01 10 we've got to finish.

11 So, if you guys want to go get a cup of coffee
12 and come back in 15 minutes, you certainly may.

13 MR. SILVERMAN: Well, as the Court is well aware,
14 in an analogous context, for example, in *United States*
15:02 15 *versus* --

16 THE COURT: Wait. I just said you could ask the
17 question. Go ahead.

18 MR. SILVERMAN: I know. Let me just get my concern
19 out.

15:02 20 In *United States v. Simmons* the Supreme Court
21 said that an accused cannot be made to choose between his
22 Fourth Amendment right to establish standing and his Fifth
23 Amendment right to not incriminate himself. And, so, what I
24 am asking you is -- Mr. Fisch's asserting his right to the
15:02 25 lawyer of choice, that's his Sixth Amendment right. I want

Fisch - Direct by Mr. Silverman

1 to establish, through him, that many more confidential
2 communications were made to him than I would have even had
3 time to adduce from Mr. Portillo; and, so, any harm from
4 this is mooted by the fact that Fisch has the information at
15:02 5 his disposal and is within his right to share it with me.

6 May I ask him that without going into the
7 substance of the --

8 THE COURT: Why don't you ask the question you want
9 to ask, and if the government believes it's appropriate for
15:03 10 them to object, at least I will have something concrete to
11 rule on.

12 DIRECT EXAMINATION

13 By Mr. Silverman:

14 Q. Without waiving your Fifth Amendment rights, Mr. Fisch,
15:03 15 is it true or not true that you had many discussions with
16 Mr. Portillo in which he divulged sensitive matters intended
17 for your attorney-client relationship only?

18 MR. PEARSON: Objection, Your Honor.

19 THE COURT: The problem is that's obviously been
15:03 20 waived by the --

21 MR. PEARSON: Mr. Portillo has waived the
22 confidentiality privilege --

23 THE COURT: With respect to Mr. Fisch.

24 MR. PEARSON: To Mr. Fisch's representation --

15:03 25 THE COURT: And Mr. Portillo has affirmatively not

Fisch - Cross by Mr. Pearson

1 waived it with respect to Mr. Silverman. He's done the
2 opposite. He's refused to waive it. Counsel is here to
3 assert it, in fact.

4 So, I'm not sure what the relevance of that
15:04 5 is. You have certainly argued -- We know there's a waiver.
6 I don't think you need to risk the Fifth Amendment issue,
7 because the point you're making is --

8 MR. SILVERMAN: -- established.

9 THE COURT: -- a matter of inference.

10 MR. SILVERMAN: Then, I withdraw the question.
11 Don't answer it.

12 No questions.

13 CROSS-EXAMINATION

14 By Mr. Pearson:

15:04 15 Q. Sir, do you waive the claim of ineffective assistance of
16 counsel with respect to Mr Silverman's prior representation
17 of Mr. Portillo?

18 A. Yes, Mr. Pearson, I do.

19 Q. Do you waive any claim of --

15:04 20 THE COURT: Is it waivable?

21 MR. PEARSON: I'm not sure, Your Honor. That's why
22 I am asking anyway. I didn't want to take the Court's time,
23 because I know we're on a short time frame, about delving
24 into the legal issues. I figured I would put it out there.

15:04 25 If it's not waivable, we'll deal with that issue when it

Fisch - Cross by Mr. Pearson

1 arises.

2 THE COURT: I think the whole point of this hearing
3 is not to allow that to arise.

4 MR. PEARSON: I understand that, Judge. And, so, I
15:05 5 apologize for --

6 THE COURT: No. No. You shouldn't apologize. I
7 think it's a different way of asking the question --

8 MR. PEARSON: Right.

9 THE COURT: -- because what we're trying to do is
15:05 10 protect effective representation.

11 DEFENDANT FISCH: Yes, Your Honor.

12 MR. PEARSON: I understand that. My first question
13 is about the effective assistance of counsel with respect to
14 Mr. Silverman's prior representation of Mr. Portillo.

15:05 15 By Mr. Pearson:

16 Q. And my second question is: Do you waive effective
17 assistance of counsel with respect to
18 Mr. Silverman's potential cross-examination of government
19 witnesses, whether it's Mr. Portillo or someone else at the
15:05 20 trial?

21 MR. SILVERMAN: No, he does not waive right to
22 effective assistance of counsel of other witnesses. I will
23 answer that for him.

24 No. Don't answer.

15:05 25 DEFENDANT FISCH: No. I'm not answering.

Fisch - Cross by Mr. Pearson

1 MR. SILVERMAN: It's not relevant.

2 THE COURT: Are you ruling on the objection?

3 MR. SILVERMAN: No.

4 THE COURT: You're doing a good job.

15:06 5 MR. SILVERMAN: A legal objection. I just jumped
6 up.

7 THE COURT: Yeah. Yeah. I would say so.

8 Why don't you reask the question in a way that
9 perhaps would be narrower.

15:06 10 MR. PEARSON: Sure.

11 By Mr. Pearson:

12 Q. With respect to cross-examination of witnesses based on
13 Mr Silverman's prior representation of Mr. Portillo.

14 A. Cross-examining --

15:06 15 That doesn't make any sense to me, Your Honor.
16 I'm sorry.

17 THE COURT: Other than Mr. Portillo?

18 MR. PEARSON: The issue I am trying to cover is
19 both the cross of Mr. Portillo but, also, whether his
15:06 20 representation of Portillo led to information that he could
21 use to cross other witnesses.

22 DEFENDANT FISCH: Mine or Mr. Silverman's, sir?

23 MR. PEARSON: That's the issue that I am talking
24 about, Your Honor.

15:06 25 DEFENDANT FISCH: I don't understand.

1 THE COURT: Either rephrase it or move to the next
2 question.

3 MR. PEARSON: Sure.

4 By Mr. Pearson:

15:06 5 Q. The question is: Do you waive your claim to ineffective
6 assistance of counsel based on Mr Silverman's knowledge that
7 he gained from his prior representation of Mr. Portillo?

8 MR. SILVERMAN: That's asked and answered.

9 THE COURT: Overruled.

15:07 10 You can answer the question.

11 DEFENDANT FISCH: Yes, Your Honor.

12 MR. PEARSON: Thank you, Your Honor. That's all I
13 have.

14 THE COURT: Anything else?

15:07 15 DEFENDANT FISCH: From me, Judge?

16 THE COURT: No. From the lawyers.

17 MR. SILVERMAN: No, ma'am.

18 THE COURT: I take it -- again, an obvious question
19 for you, but just so our record is complete -- you are aware
15:07 20 of your right to have other counsel?

21 DEFENDANT FISCH: Yes, Your Honor, I am.

22 THE COURT: All right. Any other questions?

23 MR. PEARSON: Not from the government. Thank you,
24 Your Honor.

15:07 25 THE COURT: All right. You may step down.

1 I think Mr. Fisch has, obviously, made a
2 knowing and intelligent waiver. It's informed. Mr. Fisch
3 is competent to make such a waiver. So, on those grounds,
4 the waiver clearly passes muster.

15:08 5 The question is whether there should,
6 nonetheless, be a disqualification because of the nature of
7 the actual conflict that triggered the hearing or whether
8 there is an additional potential conflict that is itself a
9 ground for disqualification.

15:08 10 And, here, I think the case law is helpful,
11 that I do have the authority to refuse a waiver such as
12 Mr. Fisch's in the case of either actual or potential
13 conflict. There has to be a showing of a serious potential
14 for conflict in order for me to override the presumption in
15:09 15 favor of counsel of one's choosing, and we all recognize
16 that. But I do have an independent interest and obligation
17 to ensure the fairness of the trial even if there is a
18 waiver of conflict of interest, and that extends to the
19 ability to reject counsel of choice when the overall
15:10 20 circumstances suggest that a conflict may develop, a serious
21 conflict, and just as the court described in *Infante*, the
22 potential for a serious conflict when Mr. Portillo testifies
23 against Mr. Fisch, which I understand to be the expected
24 plan.

15:10 25 Mr. Portillo's sentencing has been delayed

1 years in order for him to be able to do this. The result
2 will be, if Mr. Silverman is representing Mr. Fisch, to put
3 Mr. Silverman in a position conducive to divided loyalties.
4 He would have to choose between vigorously cross-examining
15:11 5 Mr. Portillo, which might jeopardize Mr. Portillo's ability
6 to get the sentencing benefit that he has apparently worked
7 hard to -- or committed to work hard to obtain or not
8 vigorously cross-examine Mr. Portillo, which would risk
9 allowing the government to establish, through Mr. Portillo's
15:11 10 testimony, an essential element of the case against
11 Mr. Fisch.

12 Mr. Silverman clearly has a potential for a
13 conflict of interest. And even though Mr. Silverman says
14 that he can't think of any confidential information that
15:12 15 hasn't been divulged that he would use against Mr. Portillo,
16 what he's also described is ample opportunity to have
17 learned information that might -- as trial and testimony
18 develop, that might, at that time, reveal itself to be
19 helpful in ways that are not as apparent today. That is
15:12 20 both likely and unpredictable.

21 That potential for a serious conflict -- and
22 it is serious because Mr. Portillo, apparently, has key
23 information and is a key witness important to the
24 government's case and, therefore, important to Mr. Fisch.
15:12 25 It is with great reluctance, because Mr. Silverman,

1 obviously, has mastered information about the case despite
2 the fact that he is a very recent addition to the case --
3 He's only served as counsel for a scant couple of weeks in a
4 case that is a week away from trial.

15:13 5 MR. SILVERMAN: May I before you say the next
6 thing, Your Honor. The decision that we have looked at,
7 *Lucio*, the judge was --

8 THE COURT: Are you going to suggest that I
9 consider appointing counsel to conduct the
15:13 10 cross-examination?

11 MR. SILVERMAN: Well, either that or --

12 THE COURT: I thought about that.

13 MR. SILVERMAN: -- that I attempt to locate --

14 THE COURT: I thought about that, and my concern
15:13 15 with that is that Mr. Portillo and the evidence that I
16 understand he is likely to present is just too pivotal. I
17 don't think that that would solve the problem.

18 MR. SILVERMAN: Well, Your Honor, if I may. The
19 thing that is distinguishing about this unique circumstance
15:14 20 is that Fisch, admittedly, spent countless hours talking to
21 Portillo about not only the things he's charged with in the
22 indictment to which he has entered a plea of guilty but all
23 other relevant conduct, all other crimes that Portillo had
24 any knowledge of, things that I have no idea about with
15:14 25 regard to Mr. Portillo. I mean, Fisch's view --

1 THE COURT: I understand there are a lot of unusual
2 factors.

3 MR. SILVERMAN: And Fisch can share that with
4 another lawyer that we can either locate and arrange for or
15:14 5 that the Court could appoint, and that lawyer can handle the
6 Portillo portion of the case. And I'm an officer of the
7 Court. I won't even talk to that person.

8 THE COURT: But, in a way, what you have just
9 described drives home the problem that we have.

15:15 10 You haven't allowed Mr. Fisch to share with
11 you the details of what Mr. Portillo told him. Correct? Is
12 that what you just told me?

13 MR. SILVERMAN: We haven't gotten to that. I would
14 be allowed to. There is no prohibition against that.

15:15 15 THE COURT: So, I misunderstood a little bit what
16 you were telling me.

17 MR. SILVERMAN: No. No. If I cross-examine
18 Portillo, I would take full advantage of what Fisch tells me
19 because I am supposed to. That's what makes this such an
15:16 20 odd situation.

21 THE COURT: But that enhances the conflict and the
22 duty of loyalty that you owe still Mr. Portillo.

23 MR. SILVERMAN: Because I don't use -- I mean, if
24 it was in a 302 I could cross-examine him with it.

15:16 25 THE COURT: It's not limited to using confidential

1 information, although that is a key factor. That's the
2 problem.

3 MR. SILVERMAN: That's what makes this case so
4 strange, is that Fisch has access to --

15:16 5 THE COURT: I understand that Mr. Fisch and
6 Mr. Portillo have a number of discussions under an attorney-
7 client rubric itself, which is -- There are lots of unusual
8 things that arise out of the fact that the defendant in this
9 case is a criminal defense lawyer and the prosecution arises
15:16 10 out of his work as a criminal defense lawyer and that some
11 of the witnesses are his former clients. There are lots of
12 unusual factors that arise in the case.

13 Having said all of that, I continue to believe
14 that that is an inadequate cure for the structural problem
15:16 15 of having an attorney who has a prior attorney-client
16 relationship in a substantially related matter with a key
17 witness for the prosecution in this case. So, that's -- I
18 just don't think that curative step is available here.

19 So, now I'd like to turn to the question of
15:17 20 what we ought to do next.

21 MR. JOHNSON: Your Honor, what we said earlier is I
22 think there are two options. Either Mr. Fisch can continue
23 representing himself as he's been doing for months or either
24 he can hire another lawyer or the government [verbatim]
15:17 25 could appoint a lawyer, and that lawyer would probably need

1 at least a little bit of time --

2 THE COURT: Oh, yeah. No. He would need a little
3 bit of time. What are you thinking? 30 days? 60 days?

4 MR. JOHNSON: Less than that, Your Honor.

15:17 5 Mr. Silverman was able to get ready, get up to speed,
6 apparently, in about a week.

7 MR. SILVERMAN: Mr. Silverman is not ready.
8 Mr. Silverman understands the global theories of the case.

9 THE COURT: I think a minimum of 30 days is
15:17 10 generally what's given. Nobody is more reluctant to do
11 this, I think you all know, than I am.

12 MR. SILVERMAN: If I may, Your Honor. I don't know
13 if I still have standing to be talking here. I don't think
14 you have said the magic words yet, but --

15:18 15 THE COURT: Well, I think I sort of have.

16 MR. SILVERMAN: -- I get where you're going. Okay.
17 May I still address the Court?

18 THE COURT: You may still address the Court.

19 MR. SILVERMAN: Thank you.

15:18 20 In light of the *Gonzalez-Lopez* case, this is
21 structural -- the right to attorney of choice, that is -- of
22 course, is now structural error, that there is no harm of
23 showing intended.

24 There is a case -- and I don't recall the
15:18 25 name -- post *Gonzalez-Lopez*. It is not a federal decision.

1 It is a decision from the Ohio Supreme Court and it holds
2 that interlocutory appeal is --

3 THE COURT: I'm not going to give an interlocutory
4 appeal. We're going to go to -- That's buying years. We're
15:19 5 not doing that.

6 MR. SILVERMAN: No. It could be on an expedited
7 schedule. The right is existent now --

8 THE COURT: I think the government has -- There is
9 an appealable issue built in here no matter how I rule.

10 MR. SILVERMAN: Yes, Your Honor.

11 THE COURT: And I think that it is unwise to simply
12 further elongate and delay these proceedings by any kind of
13 interlocutory appeal.

14 MR. JOHNSON: And, Judge, the government's position
15:19 15 is a continuance -- if there is a new lawyer, we agree that
16 there should be a continuance. We just want it to be as
17 short as possible.

18 THE COURT: We'll, obviously, have to work out a
19 schedule, but I do think that 30 days is an appropriate
15:19 20 benchmark. So, I am going to issue a new scheduling order.
21 We will not pick a jury in this case on Monday.

22 Do the parties still think it's a two-week
23 trial, roughly?

24 MR. JOHNSON: Yes, Your Honor.

15:20 25 MR. SILVERMAN: Judge, I guess it doesn't matter

1 what I think any longer, but I will tell you that this is
2 going to -- with any competent lawyer that gets into this
3 evidence, this is going to be longer than two weeks.
4 There's many, many, many, many recorded conversations that
15:20 5 are highly relevant, and I am just advising you of that.
6 It's going to be longer.

7 THE COURT: I didn't say how long a trial day was.

8 MR. SILVERMAN: Yes. That's true. Why don't we
9 just sit back and eat popcorn and listen to tapes until

15:20 10 10:00 at night? Yes. I understand.

11 THE COURT: All right. But that's helpful.

12 MR. SILVERMAN: Yes, ma'am.

13 THE COURT: Mr. Fisch, when Mr. Silverman appeared,
14 it made clear that, as we knew, you know lots of very good
15:21 15 defense lawyers and they are not in short supply in Houston,
16 Texas, and I was delighted that you were willing, at long
17 last, to be represented by one of the fine members of the
18 criminal defense bar here in Houston. I urge you to do that
19 promptly.

15:21 20 We have a 30-day window in which to work. I
21 will issue a revised scheduling order that will allow --

22 DEFENDANT FISCH: Can I address the Court, Your
23 Honor?

24 (Mr. Silverman confers with Defendant)

15:22 25 MR. JOHNSON: Your Honor, the government would ask

1 that there be a deadline by which Mr. Fisch announces his
2 new attorney.

3 THE COURT: What's the government's notion of a
4 reasonable time for that to occur?

15:22 5 MR. JOHNSON: Five days. Six days.

6 THE COURT: No. I may give him two weeks and then
7 30 days after that before we begin.

8 MR. JOHNSON: And our understanding is that --

9 THE COURT: And no new motions.

15:22 10 MR. JOHNSON: -- the pretrial motions deadline has
11 run, as has the Rule 12 notice deadline, as has the deadline
12 for turning over recordings to the government.

13 MR. SILVERMAN: Judge, that would effectively --
14 and I am just as a commentator here now -- but that would
15:22 15 effectively gut any chance at all that anybody has of fairly
16 informing the jury as to what really happened in this case,
17 and to have --

18 THE COURT: No. No. That's an argument for new
19 counsel to make if new counsel wants to make it, number one.
15:23 20 And, number two --

21 MR. SILVERMAN: I'm sorry. I just can't stop being
22 a lawyer. I'm sorry.

23 THE COURT: And, number two, if there are specific
24 issues that counsel wants to bring to my attention, I will
15:23 25 deal with specific issues. I am not going to, in the

1 abstract, take on what somebody might argue two weeks, three
2 weeks, down the pike.

3 MR. SILVERMAN: Yes, Your Honor.

4 THE COURT: But what we need is a new lawyer or a
15:23 5 statement on Mr. Fisch's part that he chooses to proceed
6 pro se, and 30 days after that I'm looking at going to
7 trial.

8 We do have another case that is scheduled that
9 we're going to have to wire around. That may add more time.
15:23 10 Mr. Fisch won't complain if that occurs. I don't know
11 what's going to happen in that case, obviously.

12 But scheduling -- one of the reasons I was
13 reluctant to continue this case, besides the history of
14 the -- I think this makes the tenth continuance -- is the
15:24 15 difficulty in rescheduling, and it's just a fact of a
16 crowded docket. So, we'll deal with it.

17 Anything further for today?

18 MR. PEARSON: May I have just a moment, Your Honor.

19 MR. JOHNSON: Judge, our suggestion is that there
15:24 20 be -- once Mr. Fisch announces who his new lawyer will be or
21 if he's proceeding pro se, that we have a status conference
22 just for scheduling purposes.

23 THE COURT: Oh, sure. I agree.

24 MR. JOHNSON: Because we have to coordinate
15:25 25 witnesses --

1 THE COURT: I am going to set a status conference
2 for the expiration of the two-week period one way or
3 t'other.

4 MS. CRISWELL: Your Honor, may I address the Court
15:25 5 briefly?

6 THE COURT: Yes, ma'am.

7 MS. CRISWELL: In the government's response to our
8 pretrial motions they had represented that they would be
9 turning over grand jury transcripts two weeks before trial,
10 as well as promise and agreements that they made to the
11 criminal defendants who are going to testify. We have not
12 received any of that information and that would have been
13 this past Monday. So, I just wanted to make that point to
14 the Court, that we haven't received the information that
15:25 15 they represented they would turn over to us.

16 THE COURT: All right. Well, now you know another
17 window.

18 I take it the government will confer with
19 counsel for Miss Bertman and work out whatever obligations
15:25 20 for providing information remain.

21 MR. PEARSON: We'll be happy to do that, Your
22 Honor.

23 THE COURT: Thank you very much.
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COURT REPORTER'S CERTIFICATE

I, BRUCE SLAVIN, certify that the foregoing is a
correct transcript from the record of proceedings in the
above-entitled matter, to the best of my ability.

s/Bruce Slavin
BRUCE SLAVIN, RPR, CMR